92-423

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner

v.

FREDERIC E. ROBY and FRANCES A. SOLLY,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do repetitive awards of punitive damages for the same course of conduct violate the Due Process Clause under the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991)?

2. Is appellate review of a jury's award of punitive damages adequate under due process where neither the factors identified by the Court in *Haslip*, nor any similar factors, are taken into account?

3. Does Fed. R. Civ. P. 16 permit the admission of prejudicial evidence in direct contravention of a pretrial order?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, the following is a list of affiliated corporate entities of the Petitioner:

Owens-Illinois de Puerto Rico

Cisper Industria e Comercio, S.A.

Companhia Industrial Sao Paulo e Rio

Cristaleria Peldar, S.A.

Andividrios, S.A.

Cristaleria del Ecuador, S.A.

Fabrica de Vidrio Los Andes, C.A.

Manufacturera de Vidrios Planos, C.A.

Owens-Illinois de Venezuela, C.A.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Owens-Illinois, Inc. ("Owens-Illinois") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the Sixth Circuit in *Solly v. Manville Corp.* is included in the Appendix at A. The judgment on the jury verdict in *Roby v. Owens-Illinois, Inc.* is included in the Appendix at B. The judgment on the jury verdict in *Solly* is included in the Appendix at C. The District Court's unreported opinion denying

Owens-Illinois' and the Manville Fund's motions for a judgment notwithstanding the verdict or a new trial in *Roby* is included in the Appendix at D. The District Court's unreported opinion denying the motions of Owens-Illinois and the Manville Fund for a judgment notwithstanding the verdict or a new trial in *Solly* is included in the Appendix at E.

The unreported pretrial order of the District Court implementing the SPRINT system is included in the Appendix at F. A subsequent pretrial order of the District Court clarifying the purpose of SPRINT procedures is included in the Appendix at G.

JURISDICTION

The Sixth Circuit entered its judgment on June 8, 1992. This Court has jurisdiction under 28 U.S.C.A. § 1254 (West Supp. 1992).

CONSTITUTIONAL PROVISIONS AND RULE OF PROCEDURE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 16 provides in relevant part:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

STATEMENT OF THE CASE

Summary

Petitioner Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles. From the late 1940's until April 1958, Owens-Illinois manufactured and sold "Kaylo," which was a type of thermal insulation material. Kaylo contained approximately 15% asbestos. Although Owens-Illinois has neither made nor sold Kaylo since 1958—34 years ago—Owens-Illinois is named as one of the defendants in tens of thousands of cases in which the plaintiffs allege personal injury resulting from exposure to asbestos.

This petition arises from two asbestos personal injury cases. Respondent Frederic Roby, a former pipefitter and sheet metal worker, developed mesothelioma, a form of cancer. Mr. Roby died after the trial in this case. Respondent Frances Solly is the widow of David Solly, an insulator who contracted asbestosis and lung cancer and died. Respondents Roby and Solly both sued several manufacturers of asbestos-containing products, including Owens-Illinois, seeking compensatory and punitive damages.

The juries in both cases heard evidence regarding punitive damages. The jury in *Roby* awarded the plaintiff $250,000 in punitive damages, while the *Solly* jury awarded no punitive damages. Owens-Illinois challenged the punitive damages award in *Roby* before the District Court and on appeal to the Sixth Circuit. On appeal, Owens-Illinois argued that the award violates due process principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

The Punitive Award In *Roby*.

The two actions were tried under the Ohio Asbestos Litigation ("OAL") Case Management Plan and Case Evaluation and Apportionment Process, a unified management system implemented by Chief Judge Thomas

D. Lambros to govern the more than 7,000 asbestos cases filed in the Northern District of Ohio. The juries in the two actions sat together for the first phase of the trial to hear evidence regarding punitive damages. The juries then separated to hear evidence regarding the individual plaintiffs, with Judge Lambros presiding in *Roby* and Judge David D. Dowd, Jr. presiding in *Solly*.

Judge Lambros' punitive damages instructions to the *Roby* jury differed from those in *Solly*. The standard given for punitive awards in *Roby* was:

> Punitive damages may be awarded where a manufacturer's testing, examination and procedure for a product are so inadequate as to manifest a flagrant indifference as to the probability that the product might expose consumers to unreasonable risks of harm.

In *Solly*, the jury was guided by a "conscious disregard" standard:

> Punitive damages may be awarded where the jury finds that [sic] on the part of the defendant, a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

Other punitive damage instructions—their purpose, their discretionary nature, and that the jury should not be motivated by passion or prejudice—were identical in both trials.

Although the juries heard the same evidence regarding punitive damages, and both awarded compensatory damages, their verdicts were dissimilar. The *Solly* jury awarded no punitive damages. Appendix C. The *Roby* jury awarded $250,000 in punitive damages. Appendix B.

Admission Of The Sprint Interview In *Solly*.

As part of the OAL case management system, Judge Lambros established a system of brief, informal interviews known as Simplified Pretrial Informational Trans-

actions ("SPRINT"). SPRINT provided the defendants a means to inquire into the plaintiffs' allegations regarding such issues as work history, product identification, and potential exposure without requiring the parties to incur the expense of depositions.

The court orders implementing the SPRINT interviews require that only one defense attorney cross-examine the witness on behalf of all defendants, and specify that the interviews are neither depositions nor designed to be used at trial. Appendix F at 43a-46a; Appendix G at 48a. In a pretrial order dated April 6, 1990 Judge Lambros explicitly stated that SPRINT interviews should "not be . . . targeted towards obtaining information directed primarily at trial preparation [since] [t]heir purpose is not to supplant traditional depositions. Rather, within the OAL case management plan, SPRINT provides an inexpensive means for the parties to evaluate witnesses for settlement purposes." Appendix G at 48a. The orders also anticipated that full depositions would occur if SPRINT did not result in the settlement of the case. *Id.*

During the *Solly* trial, however, the court allowed the plaintiff to introduce a work history attached to a SPRINT interview taken of Mr. Solly before his death. This work history was admitted as evidence of exposure to an asbestos-containing Owens-Illinois product, a showing necessary to prove causation. Owens-Illinois' objections to the admission of the interview were overruled. The *Solly* jury ruled in favor of the plaintiffs and against Owens-Illinois and the Manville Fund.

Post-Trial Review And Appeal.

Owens-Illinois moved for a judgment notwithstanding the verdict or, in the alternative, a new trial in both cases: in *Solly*, *Owens-Illinois* again challenged the admission of the SPRINT interview. In *Roby*, Owen-Illinois challenged, *inter alia*, the punitive damages award. Both motions were denied. Appendix D; Appendix E.

Owens-Illinois appealed to the Sixth Circuit. In its briefs, Owens-Illinois argued that the punitive damages award in *Roby* was unconstitutional because Owens-Illinois was being subjected to multiple awards of punitive damages in violation of due process. Owens-Illinois also argued that the procedures employed by the trial court violated the due process standards announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The Sixth Circuit affirmed, limiting its discussion to the multiple awards issue. Appendix C at 13a-14a.

Owens-Illinois also asked the Sixth Circuit to reverse the judgment in *Solly*, arguing, *inter alia*, that Judge Dowd erred in admitting the SPRINT report in *Solly* in contravention of the pretrial order without making the requisite findings under Rule 16 of the Federal Rules of Civil Procedure. The Sixth Circuit did not address the Rule 16 issue, but affirmed the district court's decision to admit the SPRINT report. Appendix C at 6a-9a.

REASONS FOR GRANTING THE WRIT

A. In the past two decades, punitive damages have become a major drag on the competitiveness of American business. The amount of money awarded as punitive damages grew more than 100 times from the early 1970's to the early 1990's, after correcting for inflation. (During the same two decades, the U.S. Gross National Product has less than doubled. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1991*, 431 (111th ed. 1991)). The total cost to American business of defending against, and paying for, punitive damages is in the hundreds of millions of dollars each year. The award of punitive damages amounts to a "windfall" for the plaintiff, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981), and directs business dollars away from investment in jobs and equipment. *Cf.* Note, *An Economic Analysis of the Plaintiff's Windfall From Punitive*

Damage Litigation, 105 Harv. L. Rev. 1900, 1909 (1992) ("[T]he lure of the plaintiff's windfall . . . . leads to increased accident costs, an artificially high rate of litigation, and a reduction of society's production possibility frontier"). Given the dramatic and idiopathic growth in the amount of punitive damages awarded in the past two decades, this Court should clarify the due process principles announced in *Haslip*.

The figures stated in the preceding paragraph on the growth of punitive damages are based on an empirical study conducted in 1992.* The study compared punitive damages awards in the four-year period from 1968 through 1971 with punitive awards during the years 1988 through 1991. The study used awards in California, Texas, Illinois, and New York, states which contain 31% of the U.S. population. For the earlier period, punitive damages totalled only $800,000, but for the later period the total was $312 million. After correcting for inflation, the amount of punitive damages increased 117 times over these twenty years. Thus, while it may be true that punitive damages are awarded in only a small fraction of cases, the long-term trend has shown a dramatic increase in the amount these damages cost American business.

During the past twenty years, the number of cases in which punitive damages were awarded increased as well, but by far less than the amounts awarded. In the earlier period, there were 73 cases, while in the more recent period there were 401. This is an increase of about five times. (In comparison, the total number of cases filed in the federal courts grew less than three times in these two decades. 1968-1971, 1988-1991 Admin. Off. of the U.S. Cts., Ann. Reps. at Table C1.) Thus, while some of the growth in punitive damages has come in the number

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*This empirical study was undertaken by the General Counsel's Office of Texaco Inc. Counsel of record for Owens-Illinois participated in this study and uses the results here with the permission of Texaco Inc.

of cases, much more of the growth has come in the amounts juries have awarded as punitive damages.

The methodology of this study is important, because it was objective and extremely conservative. The study focused only on reported appellate decisions that affirmed judgments for punitive damages, for two important reasons: First, these reported decisions are completely objective. No reliance was made on jury verdict reporters or on any anecdotal evidence. Each data point in the study is supported by a reported case citation.

Second, because the reported decisions used in the study all affirmed judgments for punitive damages, the study was able to determine the baseline amount that was actually extracted from American business in the form of punitive damages. (Of course, reported cases affirming punitive damage awards without stating the amount of the award were not included.) In this respect, the study differs from previous studies that relied on jury verdicts, because it is usually impossible to know whether a particular verdict was settled or appealed.

B. This case is yet another example of the arbitrary results that are commonplace in punitive damages cases. *E.g.*, *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992); *Owens-Illinois, Inc. v. Bolyard*, No. 913029, slip op. (W. Va. May 13, 1992), *petition for cert. filed*, No. 92-360 (Aug. 11, 1992). Here two separate juries sitting in the *same* courtroom heard the *same* evidence relevant to punitive damages. Yet the jury in *Roby* awarded substantial punitive damages against Petitioner Owens-Illinois, while the jury in *Solly* awarded *no* punitive damages.

If this arbitrary result was an aberration, or if punitive damages were an insignificant feature of the civil justice system, then this case might not warrant review by this Court. To the contrary, the statistics cited in the previous section show that punitive damages have ex-

ploded from nowhere in the past two decades, and the judicial record is rife with flatly inconsistent jury verdicts on punitive damages. The conclusion is inescapable that the civil justice system, through punitive damages, is imposing a significant financial burden on the economy in a near-random fashion. This case exemplifies this problem and thus warrants review by certiorari.

Owens-Illinois recognizes that the common law method of awarding punitive damages was upheld by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), and that, in particular, this Court sustained the jury instructions in *Haslip* on the substantive standard of conduct that triggers punitive damages, at least in a case of fraud. Yet this Court in *Haslip* relied on and emphasized the detailed trial court and appellate review of punitive damages awards required by Alabama law. This Court should clarify the due process requirements in the post-verdict phase of punitive damages cases, because in the wake of *Haslip* there has been, to some degree, a failure to take those requirements seriously.

The Sixth Circuit's decision below provides an excellent vehicle for this Court's review: In its briefs, Owens-Illinois vigorously asserted that *Haslip* required a searching examination of the punitive damages award in *Roby* of the type required under Alabama law. The Sixth Circuit, however, treated this point as a "sufficiency of the evidence" issue, and it bypassed any consideration of factors similar to those in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), which this Court approved in *Haslip*. 111 S. Ct. at 1044-45. Just as in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992), and *Mason*, 948 F.2d at 1560, the circuit court misunderstood *Haslip*, with the result that the defendants' right to due process was defeated.

C. This case raises another issue—repetitive awards of punitive damages—that goes to the heart of an important debate over the fundamental nature of due

process. It is true that punitive damages as an aspect of the common law have a long history. *Haslip*, 111 S. Ct. at 1041-43; *see also id.* at 1050 (Scalia, J., concurring) ("if a government chooses to *follow* a historically approved procedure, it necessarily *provides* due process") (emphasis in original). *Haslip* itself was a classic example of the traditional role of punitive damages: an individual plaintiff claimed intentional fraud by one or two defendants. History may validate punitive damages in that traditional context for purposes of the Due Process Clauses.

Yet *Haslip* is the exception, not the rule. As the statistics cited above suggest, punitive damages have in effect become a major American business, with an exceptional rate of growth, and exceptional financial performance. Multiple awards are a phenomenon of the latter half of this century, resulting from the advent of mass tort litigation. *See In re Sch. Asbestos Litig.*, 789 F.2d 996, 1003-04 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F.Supp. 887, 892 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). As such, they can claim no historical justification.

Owens-Illinois submits that this Court should grant certiorari here to consider whether the historical fact of punitive damages in trespass actions two hundred years ago validates repetitive awards of punitive damages for the same course of conduct in the context of contemporary American mass tort litigation.

The punitive award in *Roby* is unconstitutional because Owens-Illinois has already paid punitive damages for the course of conduct alleged in that case. Due process principles announced by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), prohibit repeated punitive awards. As this Court explained in *Haslip*, substantive due process prohibits puni-

tive damage verdicts that exceed the amount necessary to serve the societal goals of retribution and deterrence. 111 S. Ct. at 1044-45.

The *Roby* award also violates *Haslip's* holding that procedural due process requires substantive post-trial and appellate review of punitive awards to ensure that they are not unconstitutionally excessive. *Id.* One of the factors in review of an award is "the existence of other civil awards against the defendant for the same conduct." *Id.* at 1045. This factor recognizes constitutional limits on multiple punishment for the same course of conduct. Yet there are *no* mechanisms in place in federal and state court systems to ensure defendants' due process rights are not violated by multiple punitive awards.

Although no federal appellate court has held that repetitive punitive damages awards are unconstitutional, several courts have expressed profound concerns about the possibility of due process violations. In *King v. Armstrong World Industries*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991), for example, defendants challenged the repetitive nature of awards of punitive damages in asbestos litigation. The court affirmed the award at issue without addressing due process but did so with "misgivings:"

> We have misgivings, however, because we are acutely conscious of the prophetic words Judge Henry Friendly used twenty-three years ago: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."

Id. at 1033 (quoting *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967)). In other mass tort cases, several judges have expressed concern that multiple punitive awards resulting from repetitive liti-

gation would violate due process. *See In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process"), *cert. denied*, 459 U.S. 988 (1982); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act"), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

The only way to bring the asbestos litigation within due process limitations is with a uniform, nationwide rule. Only this Court can provide the necessary uniformity while clarifying the requirements of due process. This Court could require a full evidentiary hearing on prior awards as a prerequisite to any award, or mandate a system by which one jury assesses a total punitive award for a defendant's entire course of conduct. If a more elaborate system is warranted, the Court can order a stay of all punitive awards until Congress enacts such a system.

Without uniformity, however, individual courts can craft only partial solutions. For example, Judge Charles Weiner, the transferee judge in the federal multidistrict litigation, has severed the punitive damages claims from those cases, and retained jurisdiction over those claims for future, comprehensive resolution. *See* Suggestion of Remand to the Judicial Panel, MDL-875 (E.D. Pa. Apr.

30, 1992). This is a helpful step, but it is nowhere near enough because Judge Weiner has no control over the thousands of cases pending in state courts or the federal cases (such as *Roby*) that are not part of the multi-district litigation.

Individual courts that have upheld multiple punitive awards also provide incomplete solutions to the due process problems that multiple awards create. For example, in *King v. Armstrong World Industries*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991), the Fifth Circuit held that the Texas law requiring punitive damages to be "reasonably proportioned to actual damages" ensures that multiple awards do not violate the Texas Constitution. The court reasoned that under this rule each punitive award constituted a specific plaintiff's share of Celotex's total punitive damages for its conduct, apportioned based on the effect that conduct had upon that plaintiff. *Id.*

The "apportionment" rule approved in *King* lacks the procedural mechanisms necessary to protect defendants' due process rights. The rule purports to apportion punitive damages, yet it allows individual juries to hand out awards without coordinating the awards with those in other cases, or even considering the proper *total* punitive award for a single course of conduct. Because no court or jury ever computes a total punitive award, there is no inquiry as to whether the aggregate amount paid by an asbestos defendant exceeds the amount "reasonably necessary to punish and deter." *Haslip*, 111 S. Ct. 1046. Furthermore, the Texas courts—like the courts of any single state or federal circuit—lack the authority to implement the necessary protections. A court that determines a total punitive award and then apportions that award among all plaintiffs is powerless to require other courts to follow that apportionment. Only a uniform rule provided by this Court can prevent other courts from awarding plaintiffs more than their proportional

share and driving the aggregate amount beyond its constitutional limits.

Similar concerns apply to the Second Circuit's rule in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.), *cert dismissed*, 111 S. Ct. 27 (1990). There the court outlined two possible theories for restricting multiple awards, but held that defendants must make certain showings under either theory. Under one theory, defendants can argue that a prior award was the "single punitive award" for all of the defendant's wrongful conduct, but only after convincing the court that the jury in the prior action "had a complete record of the full extent of [defendant's] wrongful conduct." *Id.* at 281. Alternatively, a defendant can argue that the "aggregate punitive award" from all cases has reached constitutional limits, but only after providing the jury with evidence of the awards paid in other cases to date. *Id*

Such proof requirements are certainly reasonable; indeed, Owens-Illinois is capable of satisfying them by pointing to reported cases. The wrongful conduct that plaintiffs alleged in this case is the same conduct alleged in those cases that have resulted in awards of punitive damages against Owens-Illinois. *See Johnson v. Celotex Corp.*, 899 F.2d 1281, 1288 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990); *MCIC, Inc. v. Zenobia*, 587 A.2d 531, 536-37 (Ct. Spec. App. Md. 1991), *vacated and remanded*, 601 A.2d 633 (Md. 1992); *Eagle-Picher Indus. v. Balbos*, 578 A.2d 228, 260 (Ct. Spec. App. Md. 1990), *rev'd in part and remanded*, 604 A.2d 445 (Md. 1992); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 688 (Ct. App. Tex. 1991), *writ granted*, 35 Tex. Sup. Ct. J. 682 (Tex. 1992).

Proof requirements can be fair, however, only as part of a rule with national scope. For example, to build the record necessary to invoke the "single punitive award" theory, a defendant must provide a jury with a complete account of *all* wrongful conduct—even conduct that is irrelevant to the plaintiff in that case. In so doing, the defendant will surely enhance the size of that punitive

damage award (and help to prove a *plaintiff's* case). Without a nationwide restriction, however, that defendant has no assurance that other courts will defer to that verdict and bar further punitive damages. The likely result would therefore be an *increase*, rather than a *reduction*, in aggregate punitive damages.

The "aggregate" theory almost cannot work absent a uniform national system. Because cases will be filed in several courts, there is no assurance that other courts would defer to a finding by the Second Circuit that awards had reached a constitutional "cap." Other courts could reject the "aggregate" theory or conclude that the "cap" should be higher. Again, only a uniform rule provided by this Court could ensure a consistent approach among state and federal courts.

Perhaps the clearest evidence of the need for this Court to announce a uniform policy is *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233 (D.N.J. 1989). In that case Judge Sarokin decided to vacate his earlier order dismissing punitive damages because the defendants had already paid punitive damages for the same course of conduct. Judge Sarokin did not depart from his holding that such claims would violate due process but explained that:

> [T]his court does not have the power or the authority to prohibit subsequent awards in other courts, notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants . . . . *Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of the defendant or other defendants similarly situated.*

718 F. Supp. at 1235 (emphasis added). Until this Court promulgates guidance, the state and federal courts will continue to grope independently for solutions. This case is the appropriate vehicle for this Court to provide the guidance that the Constitution mandates and the courts need.

D. Even considered apart from prior punitive awards, the *Roby* award does not comport with *Haslip*. This Court held that the award of punitive damages in *Haslip* was consistent with due process because Alabama law provided for post-trial and appellate review of the award by application of "detailed and substantive standards." 111 S. Ct. at 1045. By applying these standards the trial and appellate courts in that case "impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages;" indeed, this Court observed that such a review had "real effect" in ensuring that awards are not "greater than reasonably necessary to punish and deter." *Id.* at 1045-46.

In stark contrast to the careful review of punitive damages awards required by *Haslip*, the *Roby* award against Owens-Illinois was not the subject of *any* substantive review. The district court dismissed Owens-Illinois' objections to the excessiveness of the award on the grounds that "passion and prejudice" did not infect the proceedings. Appendix D at 33a. This "review" falls far short of that required of the trial court by due process. *Haslip*, 111 S. Ct. at 1044 (post-trial review established by Alabama law requiring court to consider culpability of defendant's conduct, need to discourage similar conduct, impact on the parties, and impact on third parties protects defendant's rights to due process).

On appeal, the Sixth Circuit conducted no substantive review of the *Roby* award of punitive damages for excessiveness. By contrast, the Alabama procedures approved in *Haslip* subject awards to careful appellate review, and require that the review be conducted by application of seven "detailed substantive standards." *Id.* at 1044-45. Owens-Illinois argued in its briefs to the Sixth Circuit that *Haslip* required reversal of the award. Despite this argument and this Court's mandate in *Haslip*, the Sixth Circuit did not apply *any* factors to the punitive damages awarded by the *Roby* jury.

The importance of substantive review of an award of punitive damages by the appellate courts is evident in the circumstances of this case. The Sixth Circuit failed to consider "the existence of other civil awards against the defendant for the same conduct" (a factor to be taken in mitigation when weighing the excessiveness of the award), *Haslip*, 111 S. Ct. at 1045, despite Owens-Illinois' repeated arguments that multiple awards violate due process.

The inadequacy of the jury instructions in *Roby* also demonstrate the need for detailed post-trial and appellate review. The *Roby* and *Solly* juries sat in the *same* courtroom and heard the *same* evidence as to punitive damages, yet reached opposite results. The *only* difference relevant to punitive damages was the jury instructions. The *Roby* jury was instructed that plaintiffs could recover punitive damages simply by showing that defendants' "testing, examination and procedure . . . are so inadequate as to manifest a flagrant indifference" to the possibility of harm. In *Solly*, however, the jury instruction required a finding of "conscious disregard" for the safety of others to justify an award of punitive damages. The disparate outcomes in *Roby* and *Solly* can only be attributed to these conflicting instructions.

It is true that the jury instructions in both *Roby* and *Solly* explained that punitive damages serve to punish and to deter and that verdicts should not reflect "passion or prejudice," and that similar instructions were upheld in *Haslip*. The disparate outcomes of *Roby* and *Solly*, however, suggest that such "boilerplate" instructions may be insufficient to limit jury discretion. At the very least, the discrepancy in verdicts and corresponding difference in the jury instructions suggest that conclusions regarding punitive damages were anything but clear-cut. A *Haslip* review of the *Roby* award would have imposed the necessary constraint on the jury's discretion. *See Haslip*, 111 S. Ct. at 1045 (appellate court must consider rela-

tionship of award to defendant's conduct, as well as "degree of reprehensibility" of defendant's conduct, in reviewing punitive damage award). Lacking that review, Owens-Illinois was not provided due process.

The failure to consider other punitive damages awards, together with the disparity in the *Roby* and *Solly* jury verdicts, emphasize that "detailed and substantive" review of punitive damages awards plays an indispensable role in limiting awards to the amount necessary to punish and deter a course of conduct. This Court should grant certiorari in this case to further develop the principles in *Haslip* by holding that a punitive damages verdict that is subject to *no* limits on the jury's discretion violates due process.

E. This Court has never had occasion to address the effect of pretrial orders issued pursuant to Rule 16(e) of the Federal Rules of Civil Procedure on the admissibility of evidence at trial. This case provides a vehicle for this Court to define the role of pretrial orders in mass tort litigation, an important question of federal law.

The SPRINT interview procedures were established by a judicial order governing discovery in the OAL cases. The order was an integral part of an elaborate system that the district court fashioned over a period of more than seven years, and had come to represent virtual rules of procedure in the OAL cases. Judge Lambros' SPRINT orders make clear that the interviews were not intended to serve as depositions or to be admitted at trial. Appendix G.

At trial, however, the rules were changed when the Solly interview was admitted into evidence in contravention of a pretrial order. The admission of the interview was a clear violation of Rule 16 of the Federal Rules of Civil Procedure, which provides that once trial commences, pretrial orders "shall be modified only to prevent manifest injustice." In *Solly*, however, the SPRINT interview was admitted despite the pretrial OAL orders

stating that these interviews do not replace traditional depositions. The judge allowed the evidence without making the finding required by Rule 16: modification of the pretrial order is proper only to prevent manifest injustice and if neither party is substantially prejudiced by the change in procedures. *See Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1335 (8th Cir. 1985) (district court committed reversible error in admitting evidence excluded by pretrial order without making requisite finding of no prejudice to party). Owens-Illinois submits that such a facile alteration in established procedure is a violation of Rule 16.

The prejudice to Owens-Illinois as a result of the admission of Mr. Solly's SPRINT interview cannot be underestimated. It was admitted to prove an essential element of plaintiff's case—causation of injury by an Owens-Illinois product. *See State Farm Mut. Ins. Co. v. Chrysler Corp.*, 304 N.E.2d 891, 894-95 (Ohio 1973) (plaintiff must prove that defendant's product was proximate cause of injury). In addition, the SPRINT report carried none of the indicia of trustworthiness characteristic of depositions. Pursuant to Judge Lambros' order, the duration of these interviews is limited to two hours. Furthermore, only *one* defense counsel may attend and ask questions. Counsel for Owens-Illinois was *not* present at the Solly interview. Admitting such unreliable evidence without providing Owens-Illinois an opportunity to test the interview's veracity violates principles of fundamental fairness underlying due process. *See Hewitt v. Hutter*, 432 F. Supp. 795, 799 (W.D. Va. 1977), *aff'd*, 568 F.2d 773 (4th Cir. 1978) (deposition testimony inadmissible when party opponent did not have opportunity to cross-examine witness).

Owens-Illinois submits that this Court should grant certiorari to provide guidance to the state and federal courts seeking to resolve mass tort claims in a fair and expedient manner. By doing so, this Court can ensure

that where courts seek to resolve these cases using novel rules of procedure and evidence, they will do so in a manner that comports with the due process concerns on which the Federal Rules of Civil Procedure are grounded.

CONCLUSION

For the reasons stated in this Petition, the writ of certiorari should be granted and the decision of the Sixth Circuit reversed.

Respectfully submitted,

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September 8, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

91-3081/3196/3082

FRANCES A. SOLLY and FREDERIC R. ROBY,
Plaintiffs-Appellees,

v.

MANVILLE CORPORATION ASBESTOS DISEASE FUND
and OWENS-ILLINOIS, INC.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio

[Filed Jun. 8, 1992]

Before: KEITH and MILBURN, Circuit Judges; and ENSLEN, District Judge.*

PER CURIAM: This case arises from two jury trials initiated by plainitffs-appellees Donald J. and Frances A. Solly [1] ("Solly") and Frederic and Evelyn Roby

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* The Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

[1] Donald Solly died during the pendency of this action and Frances Solly continued the action as executrix.

("Roby") for injuries allegedly sustained by Donald Solly's and Frederic Roby's exposure to asbestos. Defendants represent previous manufacturers of products containing asbestos to which plaintiffs were allegedly exposed. Plaintiffs alleged at trial that their exposure to defendants' products resulted in their injuries. The juries in both cases found in favor of plaintiffs. For the reasons stated below, we AFFIRM.

I.

Both of the instant cases were part of a larger cluster of 300 cases, referred to as the 300/88 cluster, that were consolidated under the Ohio Asbestos Litigation Case Management Plan and Case Evaluation and Apportionment Process ("OAL"). In May 1990, the two cases were assigned to a sub-cluster of 16 cases and were set for trial. The trial began as a joint proceeding in July 1990 wherein "common issues" to the two cases were heard before two juries. Chief Judge Thomas D. Lambros presided over the joint proceeding, except on two days when Judge David D. Dowd, Jr. substituted Judge Lambros. The cases were separated two weeks later into individual proceedings. The proceeding for Roby continued before Judge Lambros and the Solly case convened before Judge Dowd. The plaintiffs' backgrounds were as follows.

Donald Solly was born in 1924 in New York State. He lived in New York until 1974. Solly began working as an insulator in New York in 1944, joining the International Association of Heat and Frost Insulators and Asbestos Workers in 1947. After leaving New York, Solly settled in Kentucky, where he resided until his death in 1989. Solly began working in Ohio as a superintendent at insulation job sites in 1976, although he never resided in Ohio. In 1986, Solly contracted asbestosis and in 1989 he contracted lung cancer. He died on January 12, 1989.

Frederic Roby worked as a pipefitter and sheet metal worker for 34 years, from 1946 to 1980. From 1946-1961,

he worked for the Baltimore & Ohio Railroad ("B&O"). From 1948-1958, he worked with and around an asbestos-containing insulation product called Kaylo, which was manufactured by defendant Owens-Illinois, Inc. ("O&I"). Roby subsequently contracted mesothelioma, a form of cancer allegedly caused by his exposure to asbestos.

This timely appeal followed the jury verdicts in favor of plaintiffs. We review defendants' claims against each plaintiff separately below.

II.

A. *THE SOLLY TRIAL*

Defendants O&I and The Manville Fund ("Manville") contend that the district court made several errors at the trial initiated by Solly. Both parties claim that the district court improperly applied the law of the State of Ohio in ruling on Solly's claims, rather than the law of New York; that the district court improperly admitted evidence of Solly's work history; and that the evidence was insufficient to support the verdicts against them. O&I raises several additional issues, which are discussed below.

1. *Choice of Law*

An appellate court examines a district court's choice of law ruling under a *de novo* standard of review. *See Salve Regina College v. Russell*, 111 S.Ct. 1217, 1218-1221 (1991). Moreover, a federal court sitting in diversity must apply the conflict of laws rule of the forum state. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941). Defendants contend that New York law should have applied in this case.

Prior to 1971, Ohio law mandated that the rule of *lex loci delicti*, the law of the place of injury, controlled in tort actions. The Ohio Supreme Court subsequently

modified this rule and adopted Section 145 of the Restatement (Second) of Conflict of Laws, which provides that the law of the state with the "more significant relationship to the lawsuit" should apply. *Morgan v. Biro Manufacturing Co.*, 15 Ohio St. 3d 339, 474 N.E.2d 286, 289 (per curiam) (1984). *Morgan* provides as follows:

> When confronted with a choice-of-law issue in a tort action under the Restatement of the Law of Conflicts view, analysis must begin with Section 146. Pursuant to this section, *a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship.* A court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (1) the place of injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any other factors deemed relevant to the litigation. All of these factors are to be evaluated according to their relative importance to the case.

Id. at 289 (emphasis added). As noted, the query begins with an analysis under Section 146 of the Restatement, which provides that:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, *unless*, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and to the parties, in which event the local law of the other state will be applied.

Id. at 342 (emphasis added).

For purposes of ruling on the choice of law issue, the district court held that the state where the injury oc-

curred was New York.[2] Defendants contend that this finding raised a presumption that New York, rather than Ohio, law applied. It is defendants' contention that the district court simply ignored this presumption and the alleged fact that there was no evidence to rebut it. Moreover, defendants contend that New York has the most significant relationship to the occurrence and parties herein.

The evidence in this case indicated that Solly's alleged exposure to asbestos in Ohio was less in duration and intensity than his alleged exposure in New York. This conclusion is supported by Solly's 50 year residency in New York, his 29 years of employment as an insulation mechanic in New York and the "20 years or greater" latency period ordinarily associated with asbestosis. In contrast, Solly worked for a shorter period of time in Ohio and then as a supervisor where he had less direct exposure to materials containing asbestos.

In deciding to apply Ohio law, the district court considered contacts in Ohio such as the following:

1. Four of the defendants in Solly's action had their principal place of business in Ohio;

2. Solly was exposed to asbestos in Ohio, and his last injurious exposure to asbestos was in Ohio at the Aberdeen Powerhouse in 1980;

3. Solly filed for and received Ohio workers' compensation benefits for a tumor allegedly caused by his exposure to asbestos; and

4. Solly's exposure to asbestos occurred throughout the United States (e.g., Florida, Alabama, New York, Ohio, Kentucky and Indiana).

Solly argues that it is impossible to determine any

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[2] The jury ultimately found that Solly's injury developed over time and at all of the defendants' job sites.

single place of injury in this case given the fact that his injuries developed over a period of time. Therefore, the choice of law inquiry should focus on which state has the most significant relationship to the lawsuit. We agree that an inquiry into the place of injury is inappropriate since Solly's injury occurred in various places, including Ohio. Rather, the district court should have considered, as it ultimately did, the interests of each of the states in determining whether Ohio law should apply. Given the substantial interests of Ohio noted above, we hold that the district court properly applied the law of Ohio in this case.

2. *Evidence of Work History*

Defendants contend that the district court erred in admitting documentation of plaintiff's work history and attempting to authenticate this information by evidence of a Simplified Pretrial Informational Transaction ("SPRINT") interview by Solly prior to his death. The district court admitted this evidence under the residual hearsay exception, Fed. R. Evid. 804(24),[3] finding that the evidence was sufficiently truthworthy to be admitted. This Court has held that "on the issue of trustworthiness, as with

[3] Fed. R. Evid. 803(24) provides for the admission of hearsay evidence that satisfies the following test:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

other evidentiary holdings, the trial court is given great latitude.'" *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986) (citation omitted). Accordingly, we review a district court's ruling to admit evidence for an abuse of discretion. *Id.*

A SPRINT interview is a pre-trial claim verification used in certain OAL cases in lieu of depositions. It was developed to expedite the extensive discovery needed in asbestos cases and to reduce the transactional costs associated with that discovery. Information obtained from the interview is used primarily for settlement purposes. The OAL set up the SPRINT interview process in place of discovery by depositions, providing that depositions could be conducted by the parties later in proceedings if deemed necessary. SPRINT interviews consist of an interviewing "team" of one plaintiff's lawyer and one defense lawyer, with the interviewing format to be developed by the parties. Subsequent to the interview, written summarized narratives of each witness' interview are prepared by the plaintiffs' team and the defense team and are made available to all counsel.

Both defendants contend that Solly's work history was the primary evidence that Solly worked for defendants, during which periods he worked for them and that he was exposed to asbestos by defendants. According to defendants, this information was necessary to establish whether Solly worked at their facilities at all or for a sufficient period of time to suffer an injury from his alleged exposure to defendants' products. Solly argues first that the work history was not offered into evidence by Solly's counsel, but by defendant Pittsburgh Corning Corp. during its cross examination of one of Solly's co-workers. In any case, the district court determined that the document was trustworthy and was therefore admissible under Rule 803(24).

Defendants contend that the SPRINT interview does not satisfy the requirements of Rule 803(24) and thus

the district court erred in admitting this evidence. Specifically, defendant Manville argues that there were three deficiencies in the interview process. First, defendant Manville states that notice of Solly's SPRINT interview was not given to defendants until ten days after trial began. Manville contends that this gave them inadequate time to prepare to meet and oppose the introduction of Solly's interview.

Manville also contends that the interests of justice were not properly served by admitting this evidence. Its argument in this regard is not entirely clear, but Manville makes several assertions that use of the procedure was unfair. For example, Manville contends that Judge Lambros initially stated that the testimony from these interviews would not be used at trial and then later admitted Solly's interview. In addition, SPRINT interviews are not generally intended to be admitted as evidence at trial. Finally, according to Manville, the interview was stenographically recorded and the parties were not notified that it would be recorded.

Manville and O&I also contend that the work history was not sufficiently trustworthy to satisfy Rule 803(24). To demonstrate the lack of trustworthiness, Manville points to Solly's testimony during the interview. Solly stated during the SPRINT interview that the name of one contractor was incorrectly reported and that he may have omitted the information when providing such information to his attorney. Solly could not remember the exact times that he worked for various employers, but stated that he "must have had something" on which to rely in completing the documented version of his work history. Defendants contend that because Solly could not verify the information, there was no adequate authentication of the work history. Moreover, Solly's uncertainty about information contained in the work history and his inability to authenticate the work history made the document untrustworthy.

First, we conclude that the district court did not abuse its discretion in rejecting defendants' claim that they had inadequate notice to prepare for the interview. In addition, we affirm the district court's ruling to admit the SPRINT interview. The district court opined that the SPRINT interview was trustworthy since it was taken in an adversarial setting, under oath and in the presence of a court reporter. Given these substantial procedural safeguards, we do not believe that the district court abused its discretion in admitting the SPRINT interview.

3. *Sufficiency of the Evidence*

Both defendants contend that the district court abused its discretion in denying their motions for a directed verdict. Defendants assert that Solly failed to meet his burden of proving that exposure to either of defendants' products was the proximate cause of his injuries. This Court reviews a district court's ruling on a motion for directed verdict by the same standard used by the district court; i.e., whether the verdict was against the manifest weight of the evidence. *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975).

The primary evidence of Solly's exposure to defendants' products was the testimony of Solly's former co-workers. This information was buttressed by the work history documentary evidence. The testimony was clearly sufficient to establish that Solly worked for defendants. In addition, Joseph Walters testified that Solly worked for Manville and that Solly was "exposed" to Manville's asbestos-containing products. Walters, along with Raymond Hearn and Norman Frick, also testified that Solly was exposed to O&I's asbestos-containing product, Kaylo. Moreover, there was testimony by Solly's medical expert that his exposure to asbestos throughout his employment led to his injuries. The expert testimony suggested that Solly's exposure to defendants' products contributed to his condition. We believe that this evidence was sufficient to support the

jury verdict that defendants' products caused, at least in part, Solly's injuries.

4. *Assignment of more than one judge*

Defendant O&I alleges that Judge Lambros committed clear error by assigning a different judge, Judge Dowd, to preside over a portion of Solly's trial. Defendant contends that Judge Dowd had not heard all of the evidence in the case or been in a position to observe the witnesses and, therefore, was not in a position to adequately review the sufficiency of the evidence. Contrary to O&I's assertions at oral argument, however, there is nothing in the record suggesting that O&I raised this issue below. A party may not attempt at the appellate level to materially alter his cause of action by advancing a charge for the first time. *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555 (6th Cir. 1990). In light of O&I's waiver, we affirm the appointment of Judge Dowd to preside over Solly's trial following the "common issues" joint portion of the trial.

5. *Severance of Trial Against Defendants*

O&I contends that the district court erred in denying its motion for severance from the trial against Manville. This determination is also reviewed under an abuse of discretion standard. *United States v. Arthur*, 949 F.2d 211, 217 (6th Cir. 1991). O&I essentially avers that there was substantial evidence introduced regarding Manville which was unrelated to O&I. According to O&I, Manville was not motivated to fully litigate its substantive claims because The Manville Fund was merely established to compensate individuals who suffered injury from exposure to asbestos-containing products manufactured by Johns-Manville Corp. O&I contends that a joint trial under these circumstances increased its likelihood of being assessed punitive damages.

We note first that O&I was not assessed punitive damages and thus its argument that this was a likely result

of the joint trial is untenable. Moreover, the issues related to Manville were broad and not likely to be confused with those related to O&I. Manville failed to contest its awareness of the health hazards of asbestos products, but this argument was clearly distinct from O&I's argument that it was unaware of the potential danger of its product. Therefore, although there were some inconsistencies in the trial strategies of Manville and O&I, the district court did not abuse its discretion in denying the motion to sever these trials.

6. *Extrajudicial Publicity*

O&I contends next that two days prior to the jury verdict on August 1, 1990, a highly inflammatory newspaper article was published in *The Cleveland Plain Dealer* regarding this case. O&I did not learn of the article until September 25, 1990. It moved for voir dire upon learning of the article to ascertain whether any of the jurors had read or were prejudiced by the article. The district court never ruled on this motion. O&I contends that it must be presumed that the article was read by one or more of the jurors, and, accordingly, the jury verdict must be reversed or a new trial granted.

A district court has broad discretion regarding issues on voir dire. *James v. Continental Insurance Co.*, 424 F.2d 1064 (3d Cir. 1970). Fed. R. Civ. P. 47(a) provides that "the court shall permit the parties or their attorneys to supplement the [voir dire] examination by such further inquiry *as it deems proper*. . . ." (emphasis added). While the district court in this case did not question the jurors regarding the article at issue, the court gave the customary admonition to the jurors not to speak among themselves prior to deliberations and to base their decision on evidence admitted into trial. In addition, the two-month trial was substantially completed when the article was published. Under these circumstances, we conclude that the district court did not abuse its discretion by refusing to conduct voir dire.

B. *THE ROBY TRIAL*

We next review the alleged errors in the trial brought by the Roby plaintiffs. The appeal against plaintiff Roby was brought solely by defendant O&I ("defendant"). We address defendant's contentions in seriatim below.

1. *Sufficiency of the Evidence*

Defendant contends that the district court erred in denying its motion for judgment notwithstanding the verdict. According to defendant, there was insufficient evidence that Roby's alleged exposure to defendant's product caused his injuries.

Roby testified at trial that he was exposed to defendant's asbestos-containing product, Kaylo, over a period of approximately six years. He had a total work history, however, of 34 years during which he was regularly exposed to asbestos. Roby's medical expert testified that all of Roby's exposures to asbestos over time must be considered causative of his condition. The expert did not specify that exposure to Kaylo was a substantial contributing cause of Roby's injuries. Defendant contends that generalized proof will not suffice to prove individual damages. *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988). Moreover, when exposed to many products, a plaintiff must show that exposure to defendant's product was a substantial factor. *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (Ohio St. 1990).

There was more than "generalized proof" presented in this case. There was direct evidence that Roby was exposed to defendant's product and that any such exposure contributed to his condition. In addition, the "substantial factor" test in *Pang* is inapplicable to this case. In *Pang*, the court considered the liability of several alleged tort-feasors where there were "independent concurring acts [which] caused distinct and separate injuries to the plaintiff or where some reasonable means of apportioning

the damages [was] evident." *Id.* at 197-98. Injuries such as Roby's which arise from prolonged exposure to a substance are not "distinct and separate." Nor is its cause capable of being apportioned among the alleged tort-feasors. In light of the evidence in this case, we conclude that the jury verdict was sufficiently supported.

2. *Punitive Damages*

Defendant contends that the district court erred in permitting the jury to consider an award of punitive damages. The Ohio standard for punitive damages, as set forth in *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), is that there must exist either: (1) a state of mind under which a person's conduct is characterized by hate, ill will or a spirit of revenge; or (2) a conscious disregard for the injured party's rights and safety such that the tort-feasor knew its actions had a great probability of causing substantial harm.

Roby asserts that there was substantial testimony that defendant knew about the probable hazards of exposure to asbestos. For example, in a letter dated March 12, 1943, to defendant's director of research, it was stated that Kaylo had the makings of "a first class hazard." There was another letter in November 1944 in which the director of one of defendant's laboratories was told that Kaylo constituted a hazard "either to employees engaged in the manufacture of it or to others in the use of installation of it." There were also tests which found "unmistakable evidence of asbestosis" in laboratory animals. There was additional evidence which, in total, suggested that defendant had knowledge of the hazards of asbestos exposure, yet permitted its continued use without warning to those exposed to the product. This evidence substantially supported a conclusion that defendant acted in conscious disregard of the injured parties' safety.

Nevertheless, defendant argues that due process prohibits the award of punitive damages in this case due to

defendants' assessed and potential liability to hundreds of other parties against it. Essentially, defendant argues that the award of punitive damages in numerous cases arising from the same conduct results in overkill. Defendant states in its brief that "[a]t some point courts should cease punishing a defendant for the same mistake." In support of this proposition, defendant cites *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982), which stated that "unlimited multiple punishment for the same act . . . would violate the sense of 'fundamental fairness' that is essential to constitutional due process." *Id.* at 1188 (dissenting opinion).

As a threshold matter, defendant advanced the above argument from *Federal Skywalk* without disclosing that its position was taken from the dissenting opinion. Moreover, *Federal Skywalk* is inapplicable to this case. The issue of punitive damages in that case arose in the contevt of a challenge to certification of a class which sought punitive damages. The majority did not even consider the punitive damages issues in its ruling. To the extent that the issue of multiple punitive damages was even raised, the claim was based on Missouri law. Accordingly, there is no support for defendant's claim that the award of multiple punitive damages is fundamentally unfair and we reject this contention.

3. *Consolidation of Cases, Substitution of Judges and Foreclosure of Discovery*

Defendant argues that the district court abused its discretion by foreclosing discovery in this case. Defendant contends that the district court stayed all discovery "in terms of preparation for trial" for a period of time. Defendant admits that the court allowed discovery by interrogatories, the SPRINT interviews and the collection of medical records. Defendant suggests, however, that this was for the limited purpose of settlement dis-

cussions. Defendant also implies that since the district court did not announce that it would begin trial on June 5, 1990, until April 24, 1990, defendant had inadequate time to prepare for trial.

The district court's decision to initially limit discovery was not an abuse of discretion. Defendant's attempt to distinguish preparation for trial and preparation for settlement discussions is wholly without merit. The limited, although substantial, initial discovery was relevant for either proceeding. Moreover, the district court did eventually permit full discovery in this case for all parties. Therefore, there was no abuse of discretion by the "foreclosure" of discovery. We also reject defendant's contention that it was given inadequate notice of trial.

Defendant contends next that the district court abused its discretion in consolidating this case with the case against Solly during the first two weeks of trial. This claim is also meritless. As discussed above, this decision was within the discretion of the district court, and there appears to have been no abuse whatsoever in consolidating the Solly and Roby cases on the general issues addressed during the first two weeks of trial.

Defendant also argues that the district court abused its discretion by permitting Judge Dowd to sit in place of Judge Lambros for two days. As stated above, however, defendant failed to raise this issue at trial and may not do so on appeal.

4. *"Denial" of Live Testimony by defendant's expert witness*

One of defendant's witnesses, Dr. Stephen Ayers, was allegedly scheduled to testify on July 13, 1990, on the same day that plaintiff's expert testified. Dr. Ayer's [sic] was unable to testify on that date, however, because the district court held up his testimony until plaintiff's witness was done testifying. Defendant contends that the district court held up defendant's expert testimony in order to

"punish" defendant for alleged improper and "hard ball" tactics by defendant. Defendant alleges that the district court so ruled with knowledge that Dr. Ayers was leaving the country the following week and was thereafter unavailable to testify. We do not believe, however, that the district court's decision to postpone the testimony of Dr. Ayers beyond July 13, 1990, was an abuse of discretion. The district court was under no obligation to postpone the testimony of plaintiff's witness in order to accommodate defendants. Moreover, the district court did admit the videotaped testimony of Dr. Ayers.

5. *Exclusion of Superseding Causation Evidence*

Defendant contends that the district court abused its discretion by excluding evidence that Roby's employer, B&O Railroad, was the superseding cause of Roby's injuries. Defendant desired to introduce evidence that B&O was a sophisticated user of asbestos-containing products and that B&O failed to take the proper precautions to prevent asbestos-related injuries. The district court denied the admission of any such evidence.

The factors generally used to evaluate the reasonableness of a supplier's reliance on a learned intermediary are as follows:

(1) the dangerous conditions of the product;

(2) the purpose for which the product is used;

(3) the form of any warnings given;

(4) the reliability of the third party as a conduit of necessary information about the product;

(5) the magnitude of the risk involved; and

(6) the burdens imposed on the supplier by requiring that he directly warn all users.

Adams v. Union Carbide, 737 F.2d 1453 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984).

In *Adams*, defendant Union Carbide supplied a toxic chemical to General Motors Corp., whose employees were exposed to the chemical's toxic vapors during their work at GM. The Court concluded that Union Carbide had fulfilled its duty to warn by supplying GM with detailed information about the chemical's hazards, providing information to be disseminated to GM's employees, and providing instructions to GM to limit exposure to the chemicals.

In this case, no warnings were given to B&O or provided for its employees by defendant. Therefore, it is irrelevant that defendant learned in hindsight that B&O may have been aware of a potential danger in exposure to defendant's product. Such alleged knowledge by B&O did not exonerate defendant of its duty to warn B&O and those employees exposed to Kaylo. The district court's conclusion to exclude this evidence was not an abuse of discretion.

5. *Admission of Hearsay Evidence*

Defendant avers that the district court committed clear error in admitting evidence of summary depositions in lieu of live testimony of certain corporate officials during the "common issues" portion of the trial. Both parties were permitted to summarize those depositions which they wished to present, however, and the testimony was merely narrative. Therefore, the ruling to admit the summary depositions was not clear error.

6. *Jury Instructions*

Defendant contends that the district court gave erroneous or insufficient jury instructions as follows: (1) the court gave an insufficient explanation of causation; (2) the court applied the incorrect test regarding the award of punitive damages; (3) the court failed to explain that compliance with governmental standards is strong evidence that a product is not defective; and (4)

the court gave insufficient instructions regarding the adequacy of warnings.

First, defendant alleges that the district court erroneously characterized the elements that Roby was required to establish regarding proximate cause in its charge to the jury. Defendant acknowledges, however, that the court later gave a corrected charge. Moreover, the verdict forms contained the correct charge. Therefore, there was no error in the jury charge on proximate cause.

Defendant also challenges the jury charge regarding punitive damages. The district court instructed that:

> Punitive damages may be awarded where a manufacturer's testing, examination and procedure for a product are so inadequate as to manifest a flagrant indifference as to the probability that the product might expose consumers to unreasonable risks of harm.

Defendant contends that the court should have instructed the jury pursuant to *Preston*, which mandates a showing of a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston*, 32 Ohio St.3d at 336.

We do not believe that the standard recited by the district court was substantially different from the *Preston* standard. Therefore, we conclude that any error in the charge was harmless.

Defendant contends that the district court gave an erroneous instruction on the duty to warn. According to defendant, the district court set forth the elements for the duty to warn under the strict liability standard provided in Section 402A of the Restatement of Torts 2d. The district court directed that:

> [I]t is the law that one who sells any product in a defective condition, unreasonably dangerous to the user or the consumer, is subject to liability for physi-

> cal harm thereby caused to the ultimate user or consumer if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Defendant contends that this was an improper instruction under Ohio law, which applies a negligence standard to the duty to warn.

Defendant avers that *Crislip v. TCH Liquidating Co.*, 52 Ohio St.3d 251, 556 N.E.2d 1177 (1990), provided that the same standard for the duty to warn is applied in negligence and strict liability cases. The court stated that:

> Under either a negligence or strict liability theory, the important factors for the jury to consider were whether the defendant knew or should have known of the danger and whether the warning allowed the consumer to use the product safely. In a products liability case where a claimant seeks recovery for failure to warn or warn adequately, it must be proven that the manufacturer knew, or should have known, in the exercise of ordinary care, of the risk or hazard about which it failed to warn. Further, there will be no liability unless it be shown that the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. Thus, the standard imposed upon the defendant in a strict liability claim grounded upon an inadequate warning is the same as that imposed in a negligence claim based upon inadequate warning.

Id. at 257. According to defendant, the district court's failure to give an instruction consistent with *Crislip* was error.

The distinction urged by defendant is indeed an important one. Based on the district court's instruction,

the jury need only have determined that defendant's product was defective and defendant failed to warn. Under the standard enunciated in *Crislip*, there must be proof that the defendant knew or should have known of the alleged danger of its product and yet failed to warn its users.

In the context of this entire case, however, we do not believe that the proper instruction would have altered the jury's verdict. As noted above, in order to grant punitive damages, the jury found that defendant acted with "flagrant indifference as to the probability that its product might expose [Roby] to unreasonable risk of harm." We believe that this finding supports an inference that the jury would have found that defendant knew of or should have known the risk or hazard of exposing workers to asbestos. Therefore, we hold that the improper instruction was harmless error.

Defendant also contends that the district court erroneously instructed the jury on the issue of medical causation; i.e., whether asbestos dust from defendant's product caused his cancer. The district court declined to instruct, as requested by defendant, that "if the injuries complained of might well have resulted from any one or several causes, plaintiffs must prove evidence which will exclude the effectiveness of those causes for which a defendant is not legally responsible." Defendant concludes that the omission of this explanation "left the jury with the perception that the evidence of exposure of other asbestos-containing products was not relevant to plaintiff's case." We find no merit in this argument.

The district court in this case did instruct the jury on causation. In assessing causation, the jury necessarily considered whether there were products other than defendant's product which caused Roby's injuries. This determination was implicit, and the district court's refusal to specify the relevance of other causes in assessing

whether defendant's product caused Roby's injury was not erroneous.

Finally, defendant contends that the district court erred by not instructing the jury that if defendant complied with government safety standards, then that was "strong and substantial evidence" that its product was not defective. Defendant presented evidence that during the relevant time period medical science believed that there was a safe level of exposure to asbestos. Testimony established that Ohio had implemented threshold limit values for asbestos and the American Conference of Governmental Industrial Hygienists had promulgated a safe exposure standard for asbestos, with which defendant complied.

In a products liability case involving the applicability of the Occupational Safety and Health Act ("OSHA"), this Court held that the trial court's refusal to admit OSHA standards was appropriate. *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601 (6th Cir. 1985). *Bailey* suggests that it is not always necessary to consider compliance with government standards in determining liability for a defendant's product. Moreover, in this case, there was a dispute as to whether defendant even complied with the applicable government standards by measuring the levels for asbestos at its commercial sites or specifically at Roby's place of employment. Therefore, the district court's failure to give the requested instruction was, at most, harmless error.

III.

For the above stated reasons, we AFFIRM the jury verdicts and the judgments by the Honorable Thomas D. Lambros and the Honorable David D. Dowd, Jr., United States District Judges for the Northern District of Ohio.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C88-0293

FREDERIC E. ROBY,

Plaintiff,

vs.

OWENS-ILLINOIS, INC.,

Defendant.

JUDGMENT ON JURY VERDICT

THOMAS D. LAMBROS, CHIEF JUDGE

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

that the Plaintiff, Frederic E. Roby, recover of the Defendant, Owens-Illinois, Inc. the sum of $250,000.00 compensatory damages and $250,000.00 punitive damages.

Dated at Cleveland, Ohio, this 20 day of August, 1990.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C87-1784

FRANCES A. SOLLY,
Plaintiff,

vs.

OWENS-ILLINOIS, INC.,
Defendant.

JUDGMENT ON JURY VERDICT

THOMAS D. LAMBROS, CHIEF JUDGE

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

that the plaintiff recover of the defendant, Owens-Illinois, Inc., the sum of $350,000.00 for the loss of consortium of Frances A. Solly.

Dated at Cleveland, Ohio, this 20 day of August, 1990.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C88-0293

FREDERIC E. ROBY,
Plaintiff,

vs.

OWENS-ILLINOIS, INC.,
Defendant.

ORDER

[Filed Dec. 3, 1990]

THOMAS D. LAMBROS, CHIEF JUDGE

This asbestos-related personal injury action came on for trial on July 9, 1990. The trial lasted 12 days. Upon hearing the evidence on the issues of state of the art, product identification, product exposure, medical causation and compensatory and punitive damages, eight jurors rendered a unanimous verdict awarding the Plaintiff, Frederic E. Roby, $250,000.00 compensatory damages and $250,000.00 punitive damages. Defendant Owens-Illinois, Inc. moves that it be granted a set-off against the amount of damages, both compensatory and punitive, for all amounts recevied by Plaintiff from prior settlements with other defendants. Defendant also moves for a judgment notwithstanding the verdict, or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 50(b), 59(a) and 59(e); if such motion is denied, Defendant moves that the damage verdict be set aside or remitted.

Motion for Set-Off

In support of its motion for a set-off, Defendant relies on the common law of the State of Ohio and upon Ohio Statutory provisions pertaining to contribution among joint tort feasors.

Plaintiff does not dispute that Defendant is entitled to set-off the amount received by Plaintiff from prior settlements with other defendants against the amount of compensatory damages awarded by the jury. Plaintiff contends that under Ohio common law set-off is unavailable to an award of punitive damages.

The common law rule in Ohio completely denied the right of contribution among joint tort-feasors. *Royal Indemnity Co. v. Becker* (1930), 122 Ohio St. 582; *State Farm Mut. Auto. Ins. Co. v. Charlton* (1974), 41 Ohio App. 2d 107; *Cochran v. B. & O. R.R. Co.* (1974) 41 Ohio App. 2d 186; also see 6th Circuit Court of Appeals ruling in *Fidelity & Casualty Co. of New York v. Federal Express*, 136 F.2d 35 at 41, holding that "in Ohio, there is no right of contribution between persons whose concurrent negligence has made them liable in damages." While the common law rule was partially abolished in 1976 when the Ohio General Assembly enacted Ohio Revised Code § 2307.31 and § 2307.32 which provided for contribution among two or more persons jointly or severally liable in tort, those provisions did not alter the common law rule that set-off is unavailable as to punitive damages. Ohio Revised Code § 2307.31(A) reinforces the common law practice that liability for intentional tortious behavior receives no set-off by including the provision that:

> There is no right of contribution in favor of any tort-feasor who intentionally has caused or intentionally has contributed to the injury or loss to person or property or the wrongful death.

There are social policy reasons for not permitting the set-off of punitive damages. Punitive damages are meant

to punish and deter certain types of intentionally tortious conduct. To achieve the social policy goals for which punitive damages were conceived, the tortfeasor must be made to pay for its misdeeds from its own pocket.

Counsel for Plaintiff has reported that an amount in excess of the $250,000.00 compensatory damages award was received from prior settlements with other defendants. Accordingly, the motion of Defendant Owens-Illinois, Inc. for a set-off as to the full amount of the compensatory damages is granted but denied as to the award for punitive damages for the reasons set forth above.

Motion for Judgment Notwithstanding the Verdict

As grounds for its motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, Defendant contends that: 1) Plaintiff failed to present legally sufficient evidence from which a jury could reasonably conclude that exposure to asbestos-containing products manufactured by the Defendant was a substantial cause of any injury to Plaintiff; 2) the Court erred in submitting the issue of punitive damages to the jury because the evidence presented by Plaintiff was insufficient to support a jury verdict for punitive damages against Defendant; and 3) the Court erred in submitting the charge regarding the law of strict liability because Defendant believes the Court improperly emphasized that element of law above all other elements, resulting in such bias and prejudice to Defendant that a fair and impartial verdict was precluded.

For the reasons set forth below, Defendant's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, is denied. Defendant's request that the damage verdict be set aside or remitted is also denied.

Sufficiency of Evidence

Plaintiff presented sufficient evidence from which a jury could reasonably conclude that exposure to the

asbestos-containing product manufactured by Defendant, known as "Kaylo," was a substantial cause of the lung disease of "mesothelioma" contracted by Plaintiff. In deposition testimony taken of Plaintiff and presented at the trial, Mr. Roby testified that in his employment as a boilermaker and a pipefitter for the B & O Railroad at Cumberland, Maryland from 1948-1954 and at Willard, Ohio from 1954-1958, he was exposed to Defendant's product Kaylo. In addition to this product identification and exposure testimony, Plaintiff introduced sales invoices as documentary evidence showing Kaylo shipments to those jobsites. Competent medical testimony established that each of Plaintiff's exposures to asbestos fibers contributed to the overall dosage which caused Plaintiff to contract the lung disease mesothelioma. The competent medical testimony was bolstered by competent epidemiological testimony establishing asbestos as a producing cause of the lung disease mesothelioma. The exposure and medical causation evidence was of sufficient weight, value and reliability to sustain the verdict. The medical testimony relating to the disease of mesothelioma was not challenged or refuted by any defense testimony. The dispute involved product identification, product exposure and the relationship between exposure and the disease mesothelioma. The trial evidence supports the submission of these issues to the jury, the inferences drawn by the jury, and the verdict.

Punitive Damages

The Court did not err in submitting the issue of punitive damages to the jury. Defendant contends that the Court's charge, taken from *Leichtamer v. American Motors Corp.*, (1981), 67 Ohio St. 2d 456, 424 N.E. 2d 568, constitutes reversible error. The charge was:

> Punitive damages may be awarded where a manufacturer's testing and examination procedure for a product are so inadequate as to manifest a flagrant

> indifference to the probability that the product might expose consumers to unreasonable risks of harm.

Defendant states that in Ohio, the award of punitive damages hinges upon a finding of actual malice. *Detling v. Chockley*, 70 Ohio St. 2d 134 at 136, 436 N.E. 2d 208. *Preston v. Murty*, 32 Ohio St. 3d 334 (1987), 512 N.E. 2d 1174. While *Preston* defined "actual malice" as

> 1) A state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or
>
> 2) conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

it did not overrule the Ohio Supreme Court's language in *Leichtamer*. Moreover, Plaintiff introduced an abundance of evidence, including exchanges of letters and reports between independent researchers at the Saranac Lake Laboratory and researchers and officials of Defendant, from which the jury could reasonably conclude that Defendant's actions demonstrated a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." This state of the art evidence provided a substantial basis for the jury to conclude that despite knowledge of the health hazards and dangerousness of asbestos, the Defendant failed to warn the ultimate consumer.

Defendant contends the burden of proof shall be on the Plaintiff to demonstrate by "clear and convincing evidence" that he is entitled to recover punitive damages citing amendments to the Ohio Tort Reform Act, Ohio Revised Code § 2315.21(C)(3). However, the provisions of those amendments

> shall apply only to tort or other civil actions that are commenced on and after the effective date of this act and that are based upon claims for relief that arise

> on or after that date, and only to tortious conduct that occurs on or after that date.

Ohio Revised Code § 2315 Section 3(A). Thus, the statute is inapplicable on its face since the amendments became effective on January 5, 1988 while the tortious conduct of Defendant occurred from 1948-1958.

Plaintiff Frederic E. Roby presented a sufficient evidentiary foundation for submission of the punitive damages issue to the jury.

Strict Liability

The Court did not err in submitting the charge regarding the law of strict liability. Defendant believes the Court improperly emphasized the law of strict liability above all other elements. The charge placed no undue emphasis on this segment of the applicable law. The strict liability concept was the gravamen of the liability basis of this case. The charge stated the law concisely and neutrally. The jury charge on strict liability was expressed as follows:

> Frederic E. Roby claims that he was injured as a result of his exposure to asbestos in the insulation materials manufactured and sold by Defendant Owens-Illinois, Incorporated during his years of employment as a boilermaker and pipefitter. Frederic E. Roby asserts his right to recovery against Owens-Illinois under the principles of law known as strict liability.
>
> My opening words in these instructions was a reading in pertinent part of the principle of law which the claims of Mr. Roby are asserted. Owens-Illinois denies that Frederic E. Roby has been injured by his exposure to asbestos in the insulation materials manufactured and sold by Owens-Illinois.
>
> Frederic E. Roby in this case claims damages for personal injuries alleged to have been caused by a

defective condition in the asbestos materials produced by Owens-Illinois.

Frederic E. Roby must establish by the preponderance of the evidence four elements in order to recover on this claim as to these claims against Owens-Illinois. Those elements are as follows:

(1) That Owens-Illinois manufactured or sold asbestos-containing product used by Frederic E. Roby; and

(2) That Owens-Illinois was normally engaged in the business of selling such products; and

(3) That the asbestos-containing products were expected to and did reach plaintiff without substantial change in the condition in which they were in when sold; and

(4) That at the time of such manufacture or sale, the asbestos-containing products were in a defective condition and unreasonably dangerous.

If you do not find that Owens-Illinois manufactured or sold the product to which Mr. Roby was exposed, then you shall return a verdict for Owens-Illinois on the plaintiff's strict liability claim. If you find, on the other hand, by a preponderance of the evidence that Owens-Illinois manufactured and/or sold the product to which Mr. Roby was exposed, then you shall go on to the second element of the plaintiff's strict liability claim.

As to the second element, if you do not find by a preponderance of the evidence that Owens-Illinois was normally engaged in the business of manufacturing and selling the products to which Mr. Roby was exposed, then you shall return a verdict for the defendant on the plaintiff's strict liability claim. If, on the other hand, you find by a preponderance of the evidence that Owens-Illinois was normally engaged in

the business of manufacturing and selling the products to which Mr. Roby was exposed, then you shall go on to the third element.

Regarding the third element, Frederic E. Roby must prove by a preponderance of the evidence that the asbestos containing products were expected to and did reach Mr. Roby without substantial change in the condition in which they were manufactured and sold. You are instructed that the defendant is only liable for a defective condition which was present at the time the defendant, Owens-Illinois, manufactured and/or sold the product and parted possession with it. Unless you find that the defective condition complained of was in existence at that time, the plaintiff is not entitled to recover from the defendant.

Regarding the fourth element of the plaintiff's strict liability claim, you are instructed that a defective condition unreasonably dangerous to the consumer exists if the product is, at the time it leaves the seller's hands, more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is used. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the plaintiff. A product is not defective merely because it is possible to be injured as a result of using it.

A manufacturer cannot be held liable under strict liability solely upon failure to give an adequate warning. The plaintiff may not attempt to prove that the product was defective by arguing that the product lacked the proper warnings. The plaintiff must prove by a preponderance of the evidence that there was, in

fact, a defect in the product manufactured by Owens-Illinois. If you find that with the proper precautions the asbestos product was capable of being used safely, plaintiff cannot recover on this strict liability claim and you must return a verdict in favor of the defendant.

The special verdict presented to the jury appropriately imposed upon the jury the responsibility of applying the above-stated legal principles of strict liability to the evidence and required the jury to answer special interrogatories to which the jury unanimously responded affirmatively. The special interrogatories and their unanimous response thereto were as follows:

1. Do you find from a preponderance of the evidence that Frederic E. Roby contracted mesothelioma as a result of exposure to asbestos products? *Answer*: Yes.

2. Do you find from a preponderance of the evidence that Frederic E. Roby was proximately exposed to and that he did inhale asbestos fibers emitted from Owens-Illinois' product Kaylo? *Answer*: Yes.

3. Do you find from a preponderance of the evidence that asbestos fibers emitted from Owens-Illinois Inc's product was a proximate cause of Frederic E. Roby's mesothelioma? *Answer*: Yes.

4. Do you find from a preponderance of the evidence that Owens-Illinois Inc. knew or in the exercise of reasonable care should have known in light of the state of the art of scientific knowledge which existed at the time of manufacture of its asbestos containing asbestos product Kaylo that there was a hazard to users such as Mr. Roby of contracting lung disease from using the product? *Answer*: Yes.

5. Do you find from a preponderance of the evidence that Owens-Illinois Inc. failed to give adequate

warning to users that there was a hazard of contracting lung disease from use of Kaylo? *Answer*: Yes.

6. If you answer Question 5 "Yes," do you find from a preponderance of the evidence that the failure to give adequate warning was a proximate cause of Mr. Roby's mesothelioma? *Answer*: Yes.

7. What do you find from a preponderance of the evidence are Frederic E. Roby's compensatory damages, if any? *Answer*: $250,000.00

8. Do you find from a preponderance of the evidence Frederic E. Roby to be entitled to an award of punitive damages against Owens-Illinois? *Answer*: Yes.

a. If you answer yes, what amount of punitive damages, if any, do you find? *Answer*: $250,000.00

Remitter

Not only is the record void of an atmosphere of passion and prejudice, the finding of this trial judge is that this case, which involved the most serious of asbestos-related diseases, was tried in a bland and conservative atmosphere and in a very "matter of fact" mood, totally absent of any appeal to the passion and prejudice of the jury.

Having found no indication of passion, prejudice or prejudicial error affecting the jury's verdict, and viewing the award of compensatory and punitive damages as not unreasonable in light of the verdicts rendered in similar cases around the country, there are no grounds for the damage verdict in this case to be set aside or remitted.

Conclusion

Defendant Owens-Illinois, Inc's post-judgment motion for set-off is granted as to compensatory damages but denied as to punitive damages.

Defendant's motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial is denied, as is Defendant's motion that the damage verdict be set aside or remitted.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

At Cleveland, Ohio
Dated: December 3, 1990

APPENDIX E

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C87-1784

FRANCES A. SOLLY, ETC.,
Plaintiff,

vs.

ACANDS, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Dec. 28, 1990]

I. *INTRODUCTION.*

This wrongful death action based on the claim that the decedent died as a result of an exposure to asbestos products was initially the subject of settlement efforts by the Honorable Chief Judge Thomas Lambros of this Court. The plaintiff and four defendants, Owens Illinois Corp., Manville Fund, Pittsburgh Corning and Celeotex, were unable to agree on settlement. Prior to trial, the plaintiff settled with other defendants and received the sum of $119,000. Following a lengthy jury trial presided over initially by Judge Lambros and to a conclusion by this Court, the jury was presented with a series of thirty-six interrogatories. As a result of the answers to the in-

terrogatories, the jury awarded a verdict against the defendants Owens Illinois Corp. and the Manville Fund for compensatory damages the sum of $750,000 [1] and denied punitive damages.

The jury found for the remaining defendants Pittsburgh Corning and Celotex.

The defendants Owens Illinois and the Manville Fund have filed motions for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial, and a remittitur. Additionally, the defendants seek a set off of $119,000 based upon the settlement reached by the plaintiff with the other defendants. *See* Plaintiff's Response to Motion for Set Off, at 1-2.

II. *DISCUSSION.*

A. *Motion of Owens Illinois for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial.*

Owens Illinois asserts the following bases for the relief requested.

> 1. Plaintiff failed to present legally sufficient evidence from which a jury could reasonably conclude that exposure to asbestos-containing products manufactured by O-I was a substantial cause of any injury to the plaintiff.
>
> 2. Plaintiff failed to produce legally sufficient evidence at trial to generate a jury question or support a jury verdict that O-I's alleged failure to warn of the alleged dangers of asbestos was the proximate cause of Mr. Solly's alleged injuries.

---

[1] The jury granted compensatory damages as follows:

1. Decedent's medical expenses and pain and suffering in the sum of $200,000;

2. For the wrongful death of the decedent the sum of $200,000; and

3. For the loss of consortium of the plaintiff widow $350,000.

3. Plaintiff failed to produce legally sufficient evidence at trial to support a jury verdict that the product Kaylo manufactured by O-I was defective or unreasonably dangerous at the time of its manufacture under the then existing state of medical and scientific knowledge concerning potential health hazards of asbestos.

4. The compensatory damage awards in this case are so grossly disproportionate to any proof of damages and are so excessive that they indicate bias, passion, or prejudice on behalf of the jury against defendants. Plaintiffs failed to offer any evidence as to the appointment of Mrs. Solly as Executrix, and her standing to sue on behalf of the decedent's estate, and therefore the claim for wrongful death must fail and the verdict be remitted. This Court should set aside the damage verdict and order remittitur because of the extreme disproportion between the awards and the evidence of damages "shocks one's conscience" thereby requiring a new trial.

5. The Court erred in submitting to the jury the issue of punitive damages against O-I in that the evidence presented by plaintiff was insufficient to support a jury verdict for punitive damages against O-I. Although the verdict returned by the jury did not specify an amount for punitive damages, the submission of the issue of punitive damages was so prejudicial as to taint the verdict. This defendant has filed a separate memorandum in support of this motion for judgment notwithstanding the verdict on the issue of punitive damages and incorporates the grounds and arguments set forth in such separate memorandum herein.

6. This defendant adopts, as if incorporated herein, all other grounds raised by other defendants in their

respective motions for judgment notwithstanding the verdict or a new trial.

B. *Motion of the Manville Fund for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial.*

The Manville Fund asserts the following bases for the relief requested:

1. Contrary to the express provisions of Ohio Asbestos Litigation Order No. 32, custom within the United States District Court for the Northern District of Ohio, and the policy established by Chief Judge Thomas D. Lambros in relation to the use of SPRINT interviews, the SPRINT interview of Plaintiff's decedent was admitted into evidence at the trial of this action; and

2. The trial court failed to apply the correct substantive law, the law of the State of New York, to Plaintiff's claims.

C. *Ruling on the Motion of Owens Illinois.*

The Court will rule and decide *in seriatim* the claims raised by Owens Illinois.

Branch 1 and Branch 2.

The plaintiff presented ample testimony by way of the decedent's work history and the testimony of a co-worker to support the jury's finding tat [sic] the decedent was exposed to the defendant Owens Illinois' asbestos bearing product. The testimony of Dr. Ralph Hulier and Dr. Kleinerman supported the proximate cause findings.

Branches 1 and 2 are overruled.

Branch 3.

The third branch of the defendant's motion is without merit and is overruled.

Branch 4.

The jury's award of $350,000 for loss of consortium damages nearly equals the damages allowed for pain and suffering of the victim-decedent and for the wrongful death of the decedent. The victim was obviously not in Court, but the widow-plaintiff was present and offered moving testimony with respect to the decedent's suffering and difficult death as well as moving testimony as to her damages arising from the loss of consortium. The issue that arises is whether a new trial or remittitur should be granted as to the loss of consortium damages where they appear disproportionate to the other damages awarded. Neither party has seen fit to brief this issue. The total award does not, as claimed by the defendant, shock the conscience so as to award a new trial or a remittitur. Absent any briefing by the parties on the issue of a disproportionate award of loss of consortium damages, the Court declines to grant a remittitur.

Branch Five.

The defendant objects to the Court having instructed the jury on the issue of punitive damages. However, the jury did not award punitive damages. Any error, if error was committed in submitting punitive damages is not prejudicial in the absence of an award for punitive damages.

Branch five is denied.

Branch Six.

The claims raised by the Manville Fund are separate, but as the Court has denied the claims (*infra*), the sixth branch of the motion is without merit and is overruled.

D. *Ruling on the Motion of the Manville Fund.*

Branch One.

The objection to the use of the SPRINT interview of the decedent which became a deposition is without merit.

The Court set forth its reasons during the trial for admitting the deposition of the decedent and remains of the view that it did not err in admitting the deposition which in turn contained the work history of the decedent.

Branch one is overruled.

Branch Two.

The Court has previously addressed the issue of whether the substantive law of Ohio or New York should apply. The Court adopts the reasoning set forth in that opinion and denies branch two.

E. *Motions of Owens-Illinois (docket #1488) and Manville Fund (docket #1507) for Set Off.*

On December 3, 1990, plaintiff filed a response to defendants' motion for a set off of $119,000, the amount plaintiff received from settlements with other defendants. Plaintiff does not challenge the right of defendants to set off the amount of $119,000 against the jury verdict and the defendants' motion for set off is granted.

III. *CONCLUSION.*

The motions of the defendants Owens Illinois and the Manville Fund for judgment notwithstanding the verdict or, in the alternative, for a new trial are denied. The defendants' motions for set off are granted. A judgment entry will be filed granting the plaintiffs judgment against the defendants Owens Illinois and the Manville Fund, jointly and severally, in the sum of $631,000 apportioned as follows:

To the plaintiff Frances A. Solly in her capacity as executrix for the estate of Donald J. Solly, the sum of $168,266.67 for the medical expenses and pain and suffering of the decedent Donald J. Solly; to the plaintiff Frances A. Solly in her capacity as executrix for the estate of Donald J. Solly, the sum of $168,266.67 for

the wrongful death of Donald J. Solly; and to the plaintiff Frances A. Solly the sum of $294,466.66 for her loss of consortium.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OAL Order No. 32

IN RE: OHIO ASBESTOS LITIGATION

SIMPLIFIED PRETRIAL INFORMATIONAL TRANSACTIONS (SPRINT) A CLAIM VERIFICATION PROCEDURE

[Filed Feb. 6, 1985]

THOMAS D. LAMBROS, DISTRICT JUDGE

This order establishes a court-annexed method of claim verification to facilitate settlement of the remaining asbestos cases pending in the Northern District of Ohio. This procedure is designated SPRINT, Simplified Pretrial Informational Transactions. SPRINT is a method of pretrial claim verification by adversarial interviews of witnesses in lieu of depositions. This procedure is being implemented to facilitate the completion of all informational transactions before the March 14th Settlement Conference.

The deposition is one of the most costly aspects of case preparation. Reduction in excessive expenditures of funds for case preparation without a corresponding reduction in the quality of preparation is the purpose of SPRINT.

Counsel have reported that these cases cannot be evaluated for settlement until the depositions of co-workers are

taken. These depositions are essential for product identification, verification of whether or not a particular defendant's product could arguably be considered a factor in causing the plaintiff's injuries. It has been suggested that approximately 600 depositions of co-workers must be taken. Conducting 600 depositions will be costly and time consuming.

A less costly and much faster equivalent of the deposition is required. A predeposition adversarial interview is a quicker alternative means of gathering pretrial information for claims evaluation. It is recognized that counsel have not experienced this type of alternative procedure. The many alternative avenues that are potentially available in lieu of the costly formalistic process of discovery have been considered. It has been determined that SPRINT can work and provide the parties a solution to the dilemma caused by asbestos litigation. SPRINT cuts through the unending jungle of fact gathering and provides a faster, simpler, cheaper, and effective method of obtaining important answers to crucial evaluative questions. SPRINT does not take away the right to conduct the deposition later if it is determined to be necessary.

It is my belief that satisfactory verification will be achieved by this alternative discovery process resulting in the settlement of most, if not all, of the pending cases. If this is achieved the ultimate savings in money and time will be substantial. Let's give it a try. It's worth the effort.

Accordingly, under the authority of Rule 26 of the Federal Rules of Civil Procedure all discovery by deposition in these cases is hereby temporarily suspended. SPRINT, the procedure explained below, shall be employed in place of these depositions.

The Claims Verification Procedure shall be conducted in the following manner:

1. All co-workers and plaintiffs who would otherwise have given testimony by deposition in preparation for

the Settlement Conference shall be interviewed on February 18, 19, 20 and 21.

2. The interviews shall be conducted at the federal courthouses in Cleveland, Akron, Youngstown and Toledo in accordance with a schedule which will accommodate the witnesses and the interviewing teams.

3. The lawyers for the plaintiffs and the defendants shall establish a sufficient number of interviewing teams consisting of at least one plaintiff's lawyer and one defendant's lawyer for each interviewing team.

4. Each interviewing team should complete the interviewing requirements of at least two cases per day.

5. The required number of teams should be established which are necessary to complete the interviews within the time established in this order.

6. A written summarized narrative of each witness interview shall be prepared by each interviewing team. The defense team shall prepare such a narrative and make it available to all defense counsel. The plaintiff team shall prepare such a narrative and make it available to all plaintiffs' counsel.

7. The summarized narratives shall be prepared promptly at the close of the interviewing day and made available for distribution to counsel.

8. All interviews shall be electronically recorded. Each separate plaintiff interview team and each separate defense interview team shall have a tape recorder available at the interview. It is expected that two tape recorders shall be used to record the interviews. Each separate team shall provide the recorder and the cassette.

9. The list of witnesses to be interviewed shall be comprised of those designated on the consolidated

witness list which plaintiffs' counsel are required to prepare in accordance with Ohio Asbestos Litigation Order No. 30.

10. At the February 8th OAL Conference the interviewing teams shall be designated and a schedule shall be prepared establishing team assignments and times and places for the individual witness interviews.

11. Counsel shall coordinate all scheduling requirements with the Ohio Asbestos Litigation Coordinator, Mr. Percy Squire.

12. Counsel for the plaintiffs and counsel for the defendants shall each prepare a separate interviewing format to facilitate expeditious interviewing procedures. The questions should reflect an informational content that is essential for settlement evaluation of these cases. The information required to complete the OAL data collection protocols, which embody the Case Evaluation and Apportionment Process (CEAP) critical case criteria, should serve as a guide for the questioning. The interviews will be adversarial but not obstructive in nature. It is expected that these interviews will provide counsel an informational basis for settlement as well as an opportunity to size-up the overall strength or weakness of the witnesses.

13. During the four day SPRINT procedure lead counsel are expected to coordinate among themselves and with the OAL Coordinator the transmission of all medical and economic loss data necessary for case evaluation.

It is recognized that counsel have not experienced this type of alternative procedure. The various avenues that are potentially available in lieu of costly discovery have been considered. On balance, I have determined that

SPRINT is a feasible means of providing the parties with a solution to the dilemma caused by the magnitude of discovery in asbestos litigation.

The discovery provisions outlined in Rules 26 through 37 of the Federal Rules of Civil Procedure set forth the legally sanctioned methods of gathering information for purposes of trial preparation. In order to expedite the extensive discovery traditionally associated with asbestos litigation, we have attempted to simplify these procedures through the use of consolidated discovery requests. Nonetheless, an excessive amount of time and money is still being expended on discovery in these cases. As a result of our experience, however, we are now better able to determine what information is necessary to place a realistice value on these cases. Accordingly, in order to promote the best interests of justice and the parties, all discovery in these cases pursuant to Rules 27 through 31 is hereby suspended until further order of the Court. As an alternative to these discovery procedures, the parties shall obtain the information necessary to facilitate serious settlement negotiation in accordance with directives of this order.

Each of you know that my work as a trial judge for 25 years combines the usual and customary judicial process of case decisions and resolution with an explorative endeavor constantly in search of better ways to resolve human disputes. All of us have experienced vicariously the thrill of space exploration and medical and scientific advances which have served the physical well being and strength of our nation. That same type of explorative endeavor by lawyers and judges in the universe of law will far exceed the national and potentially world wide benefit of space and medical advances because what we deal with here are matters of human conflicts. Such conflicts are capable of being resolved only through human understanding, which is essential to our existence in a civilized world. Remember when Learned Hand, speaking

at Rockefeller Center before a group of new citizens, defined the spirit of liberty among other things, as, men and women seeking to understand the minds of other men and women.

Here we work in the realm of human controversy seeking new ways to learn and to teach men and women to solve their problems sensibly. We are privileged to have this opportunity as judges and lawyers to apply our energies and our ideas to solving human problems and hopefully bringing about a better human understanding.

I therefore seek your cooperation in the fulfillment of the requirements of this order.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

Dated: February 6, 1985

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: OHIO ASBESTOS LITIGATION

ORDER

[Filed Apr. 6, 1990]

THOMAS D. LAMBROS, CHIEF JUDGE

Defendant Members of the Center for Claims Resolution seek clarification regarding the proper conduct and purpose of SPRINT interviews under OAL Order No. 32. Specifically, these defendants are concerned that the SPRINT process, which is intended to provide the parties an opportunity to question and view the plaintiffs and certain witnesses in preparation for settlement evaluation and preliminary motion practice (SSC I and SSC II), not be converted to one which is targeted towards obtaining information directed primarily at trial preparation.

SPRINTs are informal interviews which can usually be completed in about an hour and which offer a great deal of flexibility (they have, for example, been taken by telephone) while keeping litigation transaction costs to a minimum. Their purpose is not to supplant traditional depositions. Rather, within the OAL case management plan, SPRINTs provide an inexpensive means for the parties to evaluate witnesses for settlement purposes. At a later stage in the OAL process, should full blown depositions be necessary, they may, with leave, be had.

A single counsel on behalf of all defendants should conduct each SPRINT, and no papers, books, or other

documents should be presented to the individual in conjunction with, before or during the SPRINT. To do so would be to misconstrue the very basis for SPRINTs, which is merely to afford the parties an opportunity to question a witness concerning discovery which has been provided by plaintiffs in the very early stages of OAL for settlement and motion practice purposes.

Indeed, Settlement Status Conference I, which is essentially rule day for the first phase of motion practice, contemplates that parties whose motions have been denied based on discovery gathered under the first phase of the OAL plan, may renew their motions after further discovery has been taken in the second or "trial preparation" phase of the plan.

SPRINTs should therefore go forward in accordance with these clarifications.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

DATED: 4/6/90

FILED
SEP 30 1992
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(2)

No. 92-423

In The

Supreme Court of the United States

October Term, 1992

OWENS-ILLINOIS, INC.,

Petitioner,

vs.

FREDERIC E. ROBY and FRANCES A. SOLLY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In the context of an individual asbestos-related personal injury action, does awarding punitive damages against a manufacturer that has satisfied two prior punitive damage awards in other asbestos-related personal injury actions comport with due process where proper jury instruction and meaningful post-verdict review have occurred?

2. Does post-verdict review of a punitive damage award against a manufacturer of asbestos-containing products comport with due process where the trial court and the federal appellate court conducted meaningful review and where the defendant failed to provide specific facts to warrant a finding that the award was unreasonable?

3. In the context of mass tort litigation, do pretrial orders that are generally applicable to thousands of cases limit a trial judge's discretion to admit evidence?

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No. 92-423

In The

Supreme Court of the United States

October Term, 1992

OWENS-ILLINOIS, INC.,

Petitioner,

vs.

FREDERIC E. ROBY and FRANCES A. SOLLY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Frederic E. Roby and Frances A. Solly respectfully urge denial of the petition of Owens-Illinois, Inc. ("Owens-Illinois") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty or property without due process of law . . . "

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 16 provides in relevant part:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Federal Rule of Evidence 803(24) provides for admission of hearsay evidence that meets the following test:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement

> may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

Summary.

The petition of Owens-Illinois arises from jury verdicts in the Frederic Roby and the Frances Solly asbestos-related personal injury cases. The two cases, premised upon Ohio's law of products liability, were tried under the Ohio Asbestos Litigation ("OAL") Case Management Plan and Case Evaluation and Apportionment Process, a system devised by Chief Judge Thomas Lambros to handle thousands of asbestos personal injury cases filed in the Northern District of Ohio. Plaintiffs alleged their injuries were proximately caused by certain defendants' failure to warn of health hazards associated with inhalation of asbestos fibers. Owens-Illinois, manufacturer of an asbestos-containing product called Kaylo, was the sole defendant in *Roby* and was one of four defendants in *Solly*.

Frederic Roby worked from 1946 to 1980 for the Baltimore & Ohio Railroad as a pipefitter and sheet metal worker, where he was exposed from 1948 to 1958 to Kaylo while renovating railroad steam engines. Mr. Roby was diagnosed with mesothelioma, an asbestos-related, invariably fatal cancer, which caused his death after trial. Respondent Frances Solly is the widow of Donald J. Solly,

who was an asbestos insulator and later, an insulation supervisor. His exposure to asbestos spanned the years 1944 to 1986. Donald Solly contracted asbestosis and lung cancer, which caused his death prior to trial. Both Frederic Roby and Donald Solly were foreseeable users of Kaylo.

Juries were selected for each case, but they sat together during a common issue trial phase, presided over by Chief Judge Thomas Lambros. Common issues included evidence on the health hazards of asbestos, on medicine's and science's historical knowledge of the health hazards of asbestos, and on specific knowledge of each defendant company of these health hazards. Evidence at the common issue trial established that from 1948 to April 30, 1958, Owens-Illinois manufactured and distributed Kaylo pipecovering and Kaylo block, both high-temperature asbestos-containing thermal insulation products. Kaylo contained between 13% and 25% asbestos fiber. When cut to size, asbestos fibers were released from Kaylo. It was undisputed that Owens-Illinois neither affixed an asbestos-related health warning label to any Kaylo product nor sent personnel to any industrial site or any railroad yard to measure the amount of asbestos fibers released during Kaylo's commercial use.

To support their prayers for punitive damages, plaintiffs introduced substantial testimony and numerous exhibits indicating that Owens-Illinois knew about the hazards of exposure to asbestos, including a letter of March 12, 1943 from the respected Saranac Lake Laboratory to Owens-Illinois' director of research stating that Kaylo had the makings of "a first class hazard," a letter of November 19, 1944 from Saranac Lake Laboratory to

Owens-Illinois indicating that Kaylo constituted a hazard "either to employees engaged in the manufacture of it or to others in the use or installation of it," and numerous other letters and reports between Saranac Lake Laboratory and Owens-Illinois officials detailing Kaylo's capacity to produce asbestosis.

After the common phase, the two juries were separated for presentation of an individual specific phase, which focused on the victim's medical condition, his occupational and product exposure history, and damages. Judge Lambros presided in *Roby;* Judge David D. Dowd, Jr. presided in *Solly.* Owens-Illinois presented no evidence to the jury in either case of prior punitive awards made against Owens-Illinois in other asbestos-related personal injury actions; it put no documentation into evidence or into the record as to its net worth, as to the total amount of compensatory damages paid due to asbestos-related personal injury verdicts, as to the ratio between compensatory damage awards and satisfied punitive damage awards, or as to the total amount of damages paid directly from company funds.[1] It failed to

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[1] By way of Affidavit in Support Of Motion to Strike Punitive Damages Claim, filed approximately two weeks before trial, Owens-Illinois asserted, *inter alia,* that it was a defendant in over 80,000 asbestos personal injury actions and had paid one punitive award of $500,000. In its Sixth Circuit brief, Owens-Illinois indicated that it had paid another punitive damage award of $800,000. No information was supplied to either the district court or to the appellate court on Owens-Illinois' net worth, on the total amount of compensatory damages paid in all similar cases, or on the total amount of company funds, as opposed to insurance funds, expended in all asbestos-related personal injury litigation.

ask the jury for mitigation of punitive damages on grounds that Owens-Illinois already had been punished enough.

The *Roby* jury awarded Mr. Roby $250,000 in compensatory damages[2] and $250,000 in punitive damages. Appendix B. The *Solly* jury awarded a total of $750,000 against Owens-Illinois: $200,000 for Donald Solly's medical expenses and pain and suffering, $200,000 for Donald Solly's wrongful death, and $350,000 for Frances Solly's loss of consortium. Appendix C. On the basis of Ohio's law of joint and several liability for concurrent tortfeasors, due to Frederic Roby's settlements with other defendants, the *Roby* trial court granted Owens-Illinois a $250,000 setoff against the total compensatory damage verdict, thereby limiting Owens-Illinois' liability to the $250,000 punitive award. Appendix D at 26a-27a. The *Solly* court also granted Owens-Illinois' motion for setoff and entered judgment against Owens-Illinois for $631,000. Appendix E at 41a. In both *Roby* and *Solly*, Owens-Illinois' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial and Motions for Remittitur were denied. Appendix D; Appendix E. After full briefing and oral argument, the United States Court of Appeals for the Sixth Circuit denied Owens-Illinois' consolidated appeal of both decisions. Appendix A. The Sixth Circuit also denied Owens-Illinois' petition for rehearing enbanc.

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[2] Roby withdrew the loss of consortium claim, as his wife died during pendency of his case.

The Punitive Award in *Roby*.

In *Roby*, Judge Lambros gave the following punitive damage instruction, taken from *Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456 (1981):

> Punitive damages may be awarded where a manufacturer's testing, examination and procedure for a product are so inadequate as to manifest a flagrant indifference as to the probability that the product might expose consumers to unreasonable risks of harm.

The *Roby* jury charge also included the following instructions:

> If you do not find compensatory damages, you are not to consider punitive damages. However, if you do find compensatory damages, then you may proceed to consider whether he is entitled to a [sic] award of punitive damages.
>
> Punitive damages is an amount which a jury may, but is not required, to award as punishment to discourage others from committing similar acts. If you award punitive damages, the amount should be fair and reasonable under all the circumstances. It shall not be excessive nor accentuated by passion or prejudice. The amount of punitive damages rests in the strong judgment of the jury and should be determined from all of the evidence in the case.

In *Roby* post-verdict review, the trial court specifically noted that the trial record revealed no appeals to passion or prejudice and that the $250,000 award was not unreasonable in light of verdicts in similar cases nationwide. Appendix D, 34a. Both the trial court and the Sixth

Circuit found the punitive verdict to be based on sufficient evidence and proper jury instruction.[3]

Admission Of The SPRINT Interview In *Solly*.

Pursuant to the OAL Plan's goal of fair, cost-effective resolution of asbestos-related personal injury cases, on February 6, 1985, Judge Lambros issued OAL No. 32 establishing a simplified pretrial informational transaction ("SPRINT") system of "interviews." The SPRINT format, designed to reduce costs of traditional depositions, created interviewing teams of at least one plaintiff's lawyer and one defendant's lawyer. Judge Lambros directed the SPRINT interviews be adversarial but not obstructive and focused upon obtaining information related to the asbestos victim's work history, identification of products to which the victim was exposed, and overall strength of the particular case and/or witness. Appendix F at 45a-46a. The SPRINT process was developed primarily to facilitate settlement, and OAL Order

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[3] In post-trial review, Owens-Illinois argued that the following punitive damage charge from *Preston v. Murty*, 32 Ohio St.3d 334 (1987) should have been given:

> Punitive damages may be awarded where the jury finds that [sic] on the part of the defendant, a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

Both the trial court and the Sixth Circuit rejected Owens-Illinois' argument on grounds that substantial evidence supported a conclusion that Owens-Illinois acted in conscious disregard of the safety of foreseeable consumers. Appendix A at 13a; Appendix B at 29a. The Sixth Circuit found the *Leichtamer* and *Preston* punitive damage charges to be substantially similar. *Id.* at 18a.

No. 32 indicated that full-blown discovery through deposition would be available if needed. Appendix F at 44a. An unnumbered OAL Order of April 6, 1990 restated for defendant members of the Center for Claims Resolution that traditional depositions could be had if necessary. Both OAL SPRINT Orders related generally to Ohio Asbestos Litigation and neither identified itself as the final pretrial order of the *Roby* case or the *Solly* case.[4] Appendix G at 49a.

During the *Solly* trial, testimony of Solly co-workers Joseph Walters, Raymond Hearn and Norman Frick provided evidence of Solly's exposure to Kaylo. Donald Solly's work history, attached to Solly's SPRINT interview, also was admitted into evidence;[5] it buttressed co-worker testimony of exposure to Kaylo. Appendix A at 9a. Before admitting Solly's work history, the trial court determined it was sufficiently trustworthy under Fed. R. Evid. 803(24). It noted the work history had been authenticated and explained in Solly's SPRINT interview, which was taken in an adversarial setting, under oath and in the presence of a court reporter. On appeal, the Sixth Circuit found the *Solly* Court did not abuse its discretion in admitting the SPRINT interview.

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[4] The *Roby* and *Solly* common issue trial phase began on July 9, 1990; each individual specific trial began on July 24, 1990.

[5] The *Solly* work history initially was offered into evidence by defendant Pittsburgh Corning Corp. during cross-examination of a Solly co-worker.

Summary of Owens-Illinois' Petition For Writ Of Certiorari

Owens-Illinois petitions for writ of certiorari to review whether the punitive damage award in *Roby* and the admission of the SPRINT interview in *Solly* violated its Fourteenth Amendment due process rights. Regarding punitive damages, Owens-Illinois makes four arguments to support its position: punitive damages are a "major drag on the competitiveness of American business"; the fact that the *Roby* jury awarded punitive damages against Owen-Illinois while the *Solly* jury, which heard the same punitive damage evidence during the common issue phase, awarded none proves that punitive damages are impermissibly arbitrary and/or that *Roby* post-verdict review was flawed; since Owens-Illinois has paid punitive damage awards of $500,000 and $800,000 in two prior individual asbestos-related personal injury lawsuits, the punitive award in *Roby* is *per se* unconstitutional; the *Roby* $250,000 punitive damage verdict was the product of unlimited jury discretion and constitutionally inadequate post-verdict review.

It is instructive to note what Owens-Illinois fails to argue. Owens-Illinois does not claim that *Roby* jury instruction failed to state the discretionary nature or deterrent and punishment purposes of punitive damages as defined by Ohio law. It does not assert that there was insufficient evidence to support the punitive award or that awarding Mr. Roby punitive damages equal to compensatory damages was disproportionate to the injury alleged. Owens-Illinois does not argue it was barred from introducing to the jury or into the record below sufficient

documentation to support its position that satisfying two prior punitive damage awards totalling $1.3 million is the limit due process would allow.

Regarding *Solly*, Owens-Illinois claims OAL orders establishing the SPRINT system prohibited Judge Dowd from admitting Solly's SPRINT interview and attached work history into evidence without specifically finding under Federal Civ. R. 16 that admission modified a final pretrial order to prevent manifest injustice. Owens-Illinois argues that this evidentiary ruling violated its right to fundamental fairness and due process, and it asks this Court to grant certiorari to guide state and federal courts generally in their management of mass tort litigation.

Respondents Frederic Roby and Frances Solly now directly address each argument of Owens-Illinois and urge its petition for a writ of certiorari be denied on the following grounds: (1) Owens-Illinois suffered no due process injury in the *Roby* or *Solly* trials or in post-verdict reviews; (2) no applicable federal appellate decisions conflict on any point raised by Owens-Illinois; (3) public policy considerations do not mandate this Court's review.

REASONS FOR DENYING THE WRIT

A. Punitive Damage Awards Serve Important Social Purposes As Reflected In Applicable State Law.

Owens-Illinois argues this Court should grant certiorari because punitive damages are "a major drag on the competitiveness of American business." *Petition* at

Subpart A. Owens-Illinois grounds its argument on a study by Texaco, Inc., in which Owens-Illinois' counsel of record participated. Significantly, Owens-Illinois makes no allegation and has presented no evidence that punitive damage awards against it have affected its own competitiveness.

Indeed, in the long run, punitive damage awards may aid American business competitiveness by encouraging manufacturers to put safe products and/or products with adequate warnings into the marketplace. Encouraging safe products to be used by knowledgeable consumers will reduce personal injury litigation against wrongdoers; the social costs of countless injuries to innocent victims will be reduced. Although Owens-Illinois argues that punitive damages provide a plaintiff's "windfall," punitive damages serve a state's legitimate interest in punishing and deterring conscious wrongdoing by encouraging plaintiffs to sue manufacturers of unsafe products, even when potential compensatory awards may be outweighed by litigation costs. *See Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989).

Moreover, the state of Ohio, along with the vast majority of states, has determined that punitive damages serve two important public policies: punishing an offending party who is aware that its wrongful act has a great probability of causing substantial harm and setting the conscious wrongdoer up as an example to deter others from similar conduct. *Preston v. Murty*, 32 Ohio St.3d 334, 335-336 (1987). *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court's most recent statement on the constitutionality of punitive damages, accepts such punitive damages as a time-honored aspect of traditional state

tort law. *Id.* at 1041, citing *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 625 (1984). *Haslip* determines that the common-law method for assessing punitive damages is not "so inherently unfair as to deny due process and be *per se* unconstitutional". *Id.* at 1043. Owens-Illinois' nebulous claim that punitive damages harm competitiveness must not disturb the established position of punitive damages in state tort common law.

B. Non-uniformity Of Punitive Damage Verdicts In Individual Asbestos-Related Personal Injury Actions Does Not Signify Constitutional Deprivation.

Owens-Illinois asks this Court to grant certiorari on constitutional and/or on public policy grounds because juries award punitive damages inconsistently. *Petition* at Subpart B. Owens-Illinois buttresses its argument by noting that the *Roby* jury awarded punitive damages while the *Solly* jury, hearing the same evidence in the common issue trial phase, awarded none. Owens-Illinois asserts that unpredictable punitive damage awards impose "a significant financial burden on the economy," and it claims post-*Haslip* appellate review of punitive awards was inadequate in *Roby*, in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992) and in *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992).[6] Respondents address the constitutional adequacy of *Roby*'s

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[6] Petitions for certiorari were denied in *Glasscock, supra,* and *Mason, supra,* after this Court's *Haslip* decision.

punitive damage post-verdict review in Subsection D, *infra*, at pages 20-22.

Owens-Illinois' argument does not warrant this Court's review, for differing punitive damage verdicts do not prove constitutional infirmity. *Haslip, supra,* at 1055 (Kennedy, J., concurring) (inconsistency of jury punitive damage awards expected for at least two reasons – jury impaneled as decisionmaker in a single case and generality of punitive damage instructions, while encouraging flexibility, contributes to unpredictability). The punitive verdict cannot be separated from the liability determination, both based on the particular facts of each case. *See Mason, supra,* at 554 (punitive damage claim is not an independent cause of action separate from balance of plaintiff's case). Differing punitive damage verdicts derive from the jury system itself. Moreover, their very unpredictability has the positive effect of encouraging settlement.

C. Due Process Permits Imposition Of Punitive Damages In An Individual Asbestos-Related Personal Injury Trial Against A Defendant That Has Been Subject To Two Prior Punitive Damage Awards In Other Asbestos Injury Cases Where Proper Jury Instruction And Meaningful Post-Verdict Review Have Occurred And Where Damages Are Reasonable.

The heart of Owens-Illinois' argument is that multiple punitive damage awards are unconstitutional. *Petition* at Subpart C. Owens-Illinois maintains that the *Roby* punitive award "is unconstitutional [under *Haslip*]

because Owens-Illinois has already paid punitive damages for the course of conduct alleged in that case." *Petition* at 10. Owens-Illinois asks this Court to grant certiorari in order to declare one "uniform, nationwide rule" on punitive damages in the context of contemporary mass tort litigation. Owens-Illinois' request for certiorari must be denied.

Firstly, Owens-Illinois has provided no factual basis to allow full analysis of whether the *Roby* punitive damage recovery is fundamentally unfair under the Due Process Clause of the Fourteenth Amendment. In an affidavit filed with the district court approximately two weeks before trial, Owens-Illinois acknowledged satisfaction of one $500,000 award of punitive damages in an asbestos-related personal injury suit. On August 30, 1991, in its Sixth Circuit Brief, Owens-Illinois indicated satisfaction of another punitive damage award for $800,000.[7] Other than Owens-Illinois' bold assertion that it has been punished enough for its conduct in mass-marketing asbestos-containing Kaylo products that have injured thousands, no record exists as to whether this $1.3 million total punitive recovery reaches the maximum tolerable under due process. If there is such evidence, Owens-Illinois had the opportunity to present it in the courts below; but it offered none – no documentation as to its net worth, as to the ratio between its net worth and satisfied punitive awards, as to the ratio between satisfied punitive awards

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[7] Owens-Illinois paid $500,000 punitive damages in *Passentino v. Raymark Ind., Inc.*, No. 87-CV-5019 (S.D.N.Y.) (aff'd by 2d Cir.) and $800,000 in *Johnson v. ACandS, Inc.*, No. 87-CV-0724 (S.D.N.Y.) (aff'd by 2d Cir.).

and satisfied compensatory awards, as to the total amount of corporate funds expended in asbestos-related personal injury litigation. Owens-Illinois cannot correct its evidentiary failures in this Court. *See Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) (absence of adequate record defeats defendant's claim that multiple punitive damage awards violated its due process rights).

Indeed, asbestos-related personal injury defendants repeatedly have asked this Court to review whether more than one punitive damage award against a particular defendant violates due process. All requests have been denied. *See, e.g., Glasscock v. Armstrong Cork Co., supra; Mason v. Texaco, Inc., supra; King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.), *cert denied*, 111 S. Ct. 27 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986). No federal appellate court has held that repetitive punitive damage awards are unconstitutional. Each plaintiff injured by a defendant's harmful products possesses a personal right to recover under state law; if authorized by state law, each victim has a right to seek punitive damages.[8] *See Glasscock, supra*, at 1096 ("There is no principle

[8] Owens-Illinois asserts that all asbestos-related personal injury punitive damage awards against it arise from the same course of conduct. Federal appellate courts have rejected this argument. *See, e.g., Simpson, supra*, at 281 (because punitive damage verdicts depend on the facts of each case, appellate court did "not agree with appellant's assumption that all asbestos cases in which Pittsburgh Corning is a defendant may

in law limiting recovery of punitive damages to the first claimant.") and *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967) ("We know of no principle whereby the first punitive award exhausts all claims for punitive damage and would thus preclude future judgments.")

Haslip, supra, acknowledges that punitive damages properly advance a state's interest in "meaningful individualized assessment of appropriate deterrence and retribution." *Id.* at 1044. Accordingly, *Haslip* finds punitive damages constitutional when they are reasonable in amount, rational in light of their state-defined purpose and not impermissibly disproportionate to the severity of the offense. *Id.* at 1045. Because procedural and substantive due process demands were satisfied, the punitive damage award in *Haslip,* an insurance fraud case, was not constitutionally improper where the punitive award was over four times the amount of compensatory damages and over 200 times the insured's out-of-pocket expense. *Id.* at 1046.

Giving deference to state law and individual damage assessment, *Haslip* directs that due process analysis of any punitive damage award focus on the particular facts of each case. *Haslip, supra,* at 1043. ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.") Nonetheless, Owens-Illinois asks this Court to draw a "bright

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be lumped together for the purpose of testing punitive awards against the limits of due process.") and *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

line" and declare one uniform, nationwide rule of punitive damage assessment. This Court must decline, leaving to state legislatures and state courts the power and the opportunity to modify their own punitive damage common law. *Id.* at 1054 (Kennedy, J., concurring) ("It is through those means – State by State, and, at the federal level by Congress – that the legal procedures affecting our citizens are improved.") Indeed, though its effective date prevented applicability in *Roby*, the Ohio Tort Reform Act, Ohio Revised Code § 2315.21(C)(3) has raised the burden of proof necessary for punitive damage recovery in Ohio from a preponderance of the evidence standard to a clear and convincing standard.

Ohio has declared the purpose of punitive damages to be punishment and deterrence. *See Preston v. Murty, supra.* This important state policy would be frustrated by a uniform national rule which would shield a defendant such as Owens-Illinois from punitive damages simply because the magnitude of its wrongful actions in mass-marketing asbestos-containing products have injured thousands of innocent people, including Frederic Roby. *See Simpson, supra,* at 281 and *Jackson, supra,* at 407. Moreover, as regards asbestos-related personal injury litigation, the full harm wrought by Owens-Illinois' products remains unknown, with future victims as yet unidentified. Lastly, since Ohio follows the law of joint and several liability for concurrent tortfeasors, a compensatory damage award against a wrongdoer may be offset completely by a plaintiff's prior settlements with other defendants. The wrongdoer then would escape punishment entirely. Under Owens-Illinois' plan, this unjust

scenario would occur in *Roby*, where the $250,000 compensatory award against Owens-Illinois was totally offset by Frederic Roby's prior settlements with other defendants.

Accepting Owens-Illinois' argument for imposition of one aggregate punitive damage award in the context of asbestos personal injury litigation demeans Ohio's interest in deterring manufacturers from placing hazardous products into the marketplace. If only one punitive damage recovery were allowed, a defendant could calculate the award into the cost of doing business. *See Leonen, supra*, at 284 ("Rather than remove dangerous products from the market, a manufacturer may instead accept the risk of paying limited punitive damages.") As to the two prior punitive damage awards satisfied by Owens-Illinois in asbestos-related personal injury litigation, no evidence demonstrates that either jury awarding punitive damages understood the award would punish Owens-Illinois for the totality of its wrongdoing in all asbestos injury cases nationwide. Similarly, no evidence demonstrates that a trial court or appellate court had any basis to determine whether the aggregate amount of punitive damages paid by Owens-Illinois reaches the total due process would allow. *See Simpson, supra*, at 281.

Haslip acknowledges that state law governs punitive damage recovery. *Haslip* measures the punitive recovery with a Fourteenth Amendment yardstick; if the jury has exercised discretion within reasonable constraints, the trial court has reviewed the award meaningfully and adequately, and the appellate court's review has insured the recovery was reasonable, punitive damages comport with due process. *Haslip* does not deny an individual

claimant's ability to recover punitive damages in the context of contemporary mass tort litigation nor does it support Owens-Illinois' request to supplant the authority of state legislatures and state courts in the punitive damage area.

D. The Roby Punitive Damage Award, Affirmed Upon Post-Verdict Review, Comports With Due Process.

Owens-Illinois asks for certiorari to review whether the *Roby* punitive damage award violated its due process rights. Owens-Illinois asserts that the trial court placed "no limits" on the jury's discretion and that post-verdict reviews violated *Haslip*. *Petition* at Subpart D. Owens-Illinois' argument cannot withstand constitutional analysis.

Haslip, supra, indicates a three-tiered review process will determine if a punitive damage award comports with the Due Process Clause of the Fourteenth Amendment. Jury instructions, trial court review, and appellate review must insure jury discretion is exercised within reasonable constraints and punitive damages are reasonable in amount and rational in light of their state-defined purpose. *Id.* at 1044, 1045. *Haslip* does not demand each post-verdict review of punitive damage use the precise Alabama model approved in *Haslip* as the touchstone. *See Glasscock, supra,* at 1099.

As those deemed acceptable in *Haslip, Roby* jury instructions indicated that punitive damages were to punish the defendant and deter other wrongdoers from similar conduct, that they were discretionary, and that

they were to be based on the circumstances and all the evidence in the case. As did the Alabama instructions deemed constitutionally sufficient in *Haslip*, jury instructions in *Roby* furthered Ohio's interest in individual punitive damage assessment and appropriate punishment and deterrence while accommodating Owens-Illinois' interest in rational decision making. *Id.* at 1044. On review, the *Roby* trial court found substantial evidence supported the jury's conclusion that Owens-Illinois, despite its knowledge of asbestos health hazards, failed to warn the ultimate consumer of this foreseeable danger. Appendix D at 29a. The *Roby* trial court also determined the punitive damage award, in one-to-one ratio with the compensatory award, was reasonable and untainted by passion or prejudice. Appendix D at 34a. Thus, Roby trial court review followed *Haslip's* requirement that post-verdict trial court analysis be "meaningful and adequate." *Haslip* at 1044.

Sixth Circuit review in *Roby* provided the "additional check on the jury's or trial court's discretion." *Id.* at 1045. The Sixth Circuit affirmed evidence of Owens-Illinois' conscious wrongdoing met Ohio's standard for punitive damages and supported the jury's conclusion that Owens-Illinois acted with conscious disregard for Frederic Roby's safety. The Sixth Circuit specifically rejected Owens-Illinois' argument that the *Roby* punitive damage charge, taken from *Leichtamer, supra*, was substantially different from the *Solly* punitive damage, taken from *Preston v. Murty, supra*. Appendix A at 13a and 18a.[9]

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[9] Owens-Illinois misstates the wording of *Roby's* punitive damage charge by asserting the jury was instructed plaintiff

Lastly, because Owens-Illinois offered "no support for [its] claim that the award of multiple punitive damages is fundamentally unfair," the Sixth Circuit found it unnecessary to consider Owens-Illinois' argument that due process prohibited imposition of the *Roby* punitive verdict. Appendix A at 14a. Clearly, Sixth Circuit analysis met *Haslip's* requirement that appellate review verify a punitive recovery is reasonable both in light of the circumstances and the state's interest in punishment and deterrence of similar wrongdoing. *Id.* at 1045.

Owens-Illinois, like Pacific Mutual in *Haslip*, "had the benefit of the full panoply" of procedural protection. Since imposition and review of punitive damages in *Roby* comports with due process under *Haslip, supra,* this Court must deny certiorari.

E. This Court Should Not Limit A Trial Judge's Discretion To Fashion Pretrial Orders In Mass Tort Litigation.

Owens-Illinois lastly argues that admission into evidence of Solly's work history violated its right to fundamental fairness and due process. *Petition* at Subpart E. Owens-Illinois points to two OAL SPRINT orders, generally applicable to thousands of asbestos-related personal injury cases pending in the Northern District of Ohio, and

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could recover if inadequate testing procedures manifested a flagrant indifference "to the possibility of harm." *Petition* at 17. In fact, and as correctly stated by Owens-Illinois in *Petition* at 4, that indifference must be "to the *probability* that the product might expose consumers to unreasonable risks of harm." (Emphasis added.)

claims these orders became final pretrial orders in *Solly*.[10] Owens-Illinois disputes the trial judge's authority to admit the work history into evidence without first making a finding under Fed. R. Civ. P. 16 that such admission modified a final pretrial order in order to prevent manifest injustice. Owens-Illinois also asks this Court to draw another "bright line" and define the role of pretrial orders in mass tort litigation.

This Court's review is unnecessary as no constitutional injury befell Owens-Illinois when Solly's work history was admitted. As fully explained in Respondents' Statement of the Case, *supra*, at pages 8-9, Judge Lambros' OAL SPRINT orders were applicable generally to all OAL cases. During the *Solly* trial, decedent Donald Solly's work history, authenticated by his SPRINT interview, was admitted after presiding Judge Dowd analyzed the evidence and determined it was trustworthy under the residual hearsay exception, Fed. R. Evid. 803(24). On appeal, the Sixth Circuit reviewed the SPRINT interview format and found no abuse of discretion in Judge Dowd's evidentiary ruling. The appellate court opined that sufficient substantial procedural safeguards were observed

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[10] *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322 (8th Cir. 1985), cited by Owens-Illinois, is inapplicable to the *Solly* facts. In *Hale*, a products liability action against tire rim manufacturers, the pretrial judge issued a final pretrial order excluding three allegations after three years of discovery proved them to be baseless. The pretrial order was intended to supplement the pleadings. The trial judge admitted evidence on the excluded allegations and indicated he was not bound by the pretrial order. In reversing, the appellate court noted the trial judge could modify the pretrial order of another judge but could not ignore it or act contrary to it.

because the *Solly* trial court found the document trustworthy, taken in an adversarial setting, under oath and in the presence of a court reporter. Appendix A at 9a. Moreover, the Sixth Circuit observed that Solly co-workers Walters, Hearn and Frick testified to Solly's exposure to Owens-Illinois' Kaylo and that Solly's medical expert stated all Solly's exposures to asbestos throughout his career caused his injury and death. *Id.* Thus, substantial evidence independent of Solly's work history supported the jury's verdict against Owens-Illinois.

In reality, Owens-Illinois objects to the entire OAL Plan for managing asbestos-related personal injury litigation. Rather than praising the ingenuity of trial court judges in moving masses of injury cases through state and federal courts, Owens-Illinois implies that such creativity necessarily endangers due process.

OAL pretrial orders applicable to all OAL cases, including to *Solly*, do not destroy the trial judge's discretion regarding a particular case. Pretrial orders must be construed liberally, allowing judicial discretion as to preclusion or inclusion of evidence. Holding otherwise would put "the parties in a vise . . . " *See Clark v. Penn Railroad Co.*, 328 F.2d 591 (2nd Cir.), *cert. denied* 84 S. Ct. 1943 (1964). Because availability of state and federal appellate review adequately protects litigants when imaginative pretrial or trial procedures raise due process concerns, this Court must deny Owens-Illinois' request for certiorari.

CONCLUSION

Respondents Frederic Roby and Frances A. Solly urge this Honorable Court to deny Owens-Illinois' petition for writ of certiorari on the following grounds: Owens-Illinois suffered no due process injury in either the *Roby* or *Solly* trials or in their post-verdict reviews, no applicable federal appellate decisions conflict on any point raised by Owens-Illinois, and no public policy considerations mandate this Court's review.

Respectfully submitted,

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September 30, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

91-3081/3196/3082

FRANCES A. SOLLY and FREDERIC R. ROBY,
Plaintiffs-Appellees,

v.

MANVILLE CORPORATION ASBESTOS DISEASE FUND and OWENS-ILLINOIS, INC.,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio

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[Filed Jun. 8, 1992]

Before: KEITH and MILBURN, Circuit Judges; and ENSLEN, District Judge.*

PER CURIAM: This case arises from two jury trials initiated by plainitffs-appellees Donald J. and Frances A. Solly[1] ("Solly") and Frederic and Evelyn Roby

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* The Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

[1] Donald Solly died during the pendency of this action and Frances Solly continued the action as executrix.

("Roby") for injuries allegedly sustained by Donald Solly's and Frederic Roby's exposure to asbestos. Defendants represent previous manufacturers of products containing asbestos to which plaintiffs were allegedly exposed. Plaintiffs alleged at trial that their exposure to defendants' products resulted in their injuries. The juries in both cases found in favor of plaintiffs. For the reasons stated below, we AFFIRM.

I.

Both of the instant cases were part of a larger cluster of 300 cases, referred to as the 300/88 cluster, that were consolidated under the Ohio Asbestos Litigation Case Management Plan and Case Evaluation and Apportionment Process ("OAL"). In May 1990, the two cases were assigned to a sub-cluster of 16 cases and were set for trial. The trial began as a joint proceeding in July 1990 wherein "common issues" to the two cases were heard before two juries. Chief Judge Thomas D. Lambros presided over the joint proceeding, except on two days when Judge David D. Dowd, Jr. substituted Judge Lambros. The cases were separated two weeks later into individual proceedings. The proceeding for Roby continued before Judge Lambros and the Solly case convened before Judge Dowd. The plaintiffs' backgrounds were as follows.

Donald Solly was born in 1924 in New York State. He lived in New York until 1974. Solly began working as an insulator in New York in 1944, joining the International Association of Heat and Frost Insulators and Asbestos Workers in 1947. After leaving New York, Solly settled in Kentucky, where he resided until his death in 1989. Solly began working in Ohio as a superintendent at insulation job sites in 1976, although he never resided in Ohio. In 1986, Solly contracted asbestosis and in 1989 he contracted lung cancer. He died on January 12, 1989.

Frederic Roby worked as a pipefitter and sheet metal worker for 34 years, from 1946 to 1980. From 1946-1961,

he worked for the Baltimore & Ohio Railroad ("B&O"). From 1948-1958, he worked with and around an asbestos-containing insulation product called Kaylo, which was manufactured by defendant Owens-Illinois, Inc. ("O&I"). Roby subsequently contracted mesothelioma, a form of cancer allegedly caused by his exposure to asbestos.

This timely appeal followed the jury verdicts in favor of plaintiffs. We review defendants' claims against each plaintiff separately below.

II.

A. *THE SOLLY TRIAL*

Defendants O&I and The Manville Fund ("Manville") contend that the district court made several errors at the trial initiated by Solly. Both parties claim that the district court improperly applied the law of the State of Ohio in ruling on Solly's claims, rather than the law of New York; that the district court improperly admitted evidence of Solly's work history; and that the evidence was insufficient to support the verdicts against them. O&I raises several additional issues, which are discussed below.

1. *Choice of Law*

An appellate court examines a district court's choice of law ruling under a *de novo* standard of review. *See Salve Regina College v. Russell*, 111 S.Ct. 1217, 1218-1221 (1991). Moreover, a federal court sitting in diversity must apply the conflict of laws rule of the forum state. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941). Defendants contend that New York law should have applied in this case.

Prior to 1971, Ohio law mandated that the rule of *lex loci delicti*, the law of the place of injury, controlled in tort actions. The Ohio Supreme Court subsequently

modified this rule and adopted Section 145 of the Restatement (Second) of Conflict of Laws, which provides that the law of the state with the "more significant relationship to the lawsuit" should apply. *Morgan v. Biro Manufacturing Co.*, 15 Ohio St. 3d 339, 474 N.E.2d 286, 289 (per curiam) (1984). *Morgan* provides as follows:

> When confronted with a choice-of-law issue in a tort action under the Restatement of the Law of Conflicts view, analysis must begin with Section 146. Pursuant to this section, *a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship.* A court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (1) the place of injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any other factors deemed relevant to the litigation. All of these factors are to be evaluated according to their relative importance to the case.

Id. at 289 (emphasis added). As noted, the query begins with an analysis under Section 146 of the Restatement, which provides that:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, *unless*, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and to the parties, in which event the local law of the other state will be applied.

Id. at 342 (emphasis added).

For purposes of ruling on the choice of law issue, the district court held that the state where the injury oc-

curred was New York.[2] Defendants contend that this finding raised a presumption that New York, rather than Ohio, law applied. It is defendants' contention that the district court simply ignored this presumption and the alleged fact that there was no evidence to rebut it. Moreover, defendants contend that New York has the most significant relationship to the occurrence and parties herein.

The evidence in this case indicated that Solly's alleged exposure to asbestos in Ohio was less in duration and intensity than his alleged exposure in New York. This conclusion is supported by Solly's 50 year residency in New York, his 29 years of employment as an insulation mechanic in New York and the "20 years or greater" latency period ordinarily associated with asbestosis. In contrast, Solly worked for a shorter period of time in Ohio and then as a supervisor where he had less direct exposure to materials containing asbestos.

In deciding to apply Ohio law, the district court considered contacts in Ohio such as the following:

1. Four of the defendants in Solly's action had their principal place of business in Ohio;

2. Solly was exposed to asbestos in Ohio, and his last injurious exposure to asbestos was in Ohio at the Aberdeen Powerhouse in 1980;

3. Solly filed for and received Ohio workers' compensation benefits for a tumor allegedly caused by his exposure to asbestos; and

4. Solly's exposure to asbestos occurred throughout the United States (e.g., Florida, Alabama, New York, Ohio, Kentucky and Indiana).

Solly argues that it is impossible to determine any

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[2] The jury ultimately found that Solly's injury developed over time and at all of the defendants' job sites.

single place of injury in this case given the fact that his injuries developed over a period of time. Therefore, the choice of law inquiry should focus on which state has the most significant relationship to the lawsuit. We agree that an inquiry into the place of injury is inappropriate since Solly's injury occurred in various places, including Ohio. Rather, the district court should have considered, as it ultimately did, the interests of each of the states in determining whether Ohio law should apply. Given the substantial interests of Ohio noted above, we hold that the district court properly applied the law of Ohio in this case.

2. *Evidence of Work History*

Defendants contend that the district court erred in admitting documentation of plaintiff's work history and attempting to authenticate this information by evidence of a Simplified Pretrial Informational Transaction ("SPRINT") interview by Solly prior to his death. The district court admitted this evidence under the residual hearsay exception, Fed. R. Evid. 804(24),[3] finding that the evidence was sufficiently truthworthy to be admitted. This Court has held that "on the issue of trustworthiness, as with

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[3] Fed. R. Evid. 803(24) provides for the admission of hearsay evidence that satisfies the following test:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

other evidentiary holdings, the trial court is given great latitude.'" *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986) (citation omitted). Accordingly, we review a district court's ruling to admit evidence for an abuse of discretion. *Id.*

A SPRINT interview is a pre-trial claim verification used in certain OAL cases in lieu of depositions. It was developed to expedite the extensive discovery needed in asbestos cases and to reduce the transactional costs associated with that discovery. Information obtained from the interview is used primarily for settlement purposes. The OAL set up the SPRINT interview process in place of discovery by depositions, providing that depositions could be conducted by the parties later in proceedings if deemed necessary. SPRINT interviews consist of an interviewing "team" of one plaintiff's lawyer and one defense lawyer, with the interviewing format to be developed by the parties. Subsequent to the interview, written summarized narratives of each witness' interview are prepared by the plaintiffs' team and the defense team and are made available to all counsel.

Both defendants contend that Solly's work history was the primary evidence that Solly worked for defendants, during which periods he worked for them and that he was exposed to asbestos by defendants. According to defendants, this information was necessary to establish whether Solly worked at their facilities at all or for a sufficient period of time to suffer an injury from his alleged exposure to defendants' products. Solly argues first that the work history was not offered into evidence by Solly's counsel, but by defendant Pittsburgh Corning Corp. during its cross examination of one of Solly's co-workers. In any case, the district court determined that the document was trustworthy and was therefore admissible under Rule 803(24).

Defendants contend that the SPRINT interview does not satisfy the requirements of Rule 803(24) and thus

the district court erred in admitting this evidence. Specifically, defendant Manville argues that there were three deficiencies in the interview process. First, defendant Manville states that notice of Solly's SPRINT interview was not given to defendants until ten days after trial began. Manville contends that this gave them inadequate time to prepare to meet and oppose the introduction of Solly's interview.

Manville also contends that the interests of justice were not properly served by admitting this evidence. Its argument in this regard is not entirely clear, but Manville makes several assertions that use of the procedure was unfair. For example, Manville contends that Judge Lambros initially stated that the testimony from these interviews would not be used at trial and then later admitted Solly's interview. In addition, SPRINT interviews are not generally intended to be admitted as evidence at trial. Finally, according to Manville, the interview was stenographically recorded and the parties were not notified that it would be recorded.

Manville and O&I also contend that the work history was not sufficiently trustworthy to satisfy Rule 803(24). To demonstrate the lack of trustworthiness, Manville points to Solly's testimony during the interview. Solly stated during the SPRINT interview that the name of one contractor was incorrectly reported and that he may have omitted the information when providing such information to his attorney. Solly could not remember the exact times that he worked for various employers, but stated that he "must have had something" on which to rely in completing the documented version of his work history. Defendants contend that because Solly could not verify the information, there was no adequate authentication of the work history. Moreover, Solly's uncertainty about information contained in the work history and his inability to authenticate the work history made the document untrustworthy.

First, we conclude that the district court did not abuse its discretion in rejecting defendants' claim that they had inadequate notice to prepare for the interview. In addition, we affirm the district court's ruling to admit the SPRINT interview. The district court opined that the SPRINT interview was trustworthy since it was taken in an adversarial setting, under oath and in the presence of a court reporter. Given these substantial procedural safeguards, we do not believe that the district court abused its discretion in admitting the SPRINT interview.

3. *Sufficiency of the Evidence*

Both defendants contend that the district court abused its discretion in denying their motions for a directed verdict. Defendants assert that Solly failed to meet his burden of proving that exposure to either of defendants' products was the proximate cause of his injuries. This Court reviews a district court's ruling on a motion for directed verdict by the same standard used by the district court; i.e., whether the verdict was against the manifest weight of the evidence. *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975).

The primary evidence of Solly's exposure to defendants' products was the testimony of Solly's former co-workers. This information was buttressed by the work history documentary evidence. The testimony was clearly sufficient to establish that Solly worked for defendants. In addition, Joseph Walters testified that Solly worked for Manville and that Solly was "exposed" to Manville's asbestos-containing products. Walters, along with Raymond Hearn and Norman Frick, also testified that Solly was exposed to O&I's asbestos-containing product, Kaylo. Moreover, there was testimony by Solly's medical expert that his exposure to asbestos throughout his employment led to his injuries. The expert testimony suggested that Solly's exposure to defendants' products contributed to his condition. We believe that this evidence was sufficient to support the

jury verdict that defendants' products caused, at least in part, Solly's injuries.

4. *Assignment of more than one judge*

Defendant O&I alleges that Judge Lambros committed clear error by assigning a different judge, Judge Dowd, to preside over a portion of Solly's trial. Defendant contends that Judge Dowd had not heard all of the evidence in the case or been in a position to observe the witnesses and, therefore, was not in a position to adequately review the sufficiency of the evidence. Contrary to O&I's assertions at oral argument, however, there is nothing in the record suggesting that O&I raised this issue below. A party may not attempt at the appellate level to materially alter his cause of action by advancing a charge for the first time. *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555 (6th Cir. 1990). In light of O&I's waiver, we affirm the appointment of Judge Dowd to preside over Solly's trial following the "common issues" joint portion of the trial.

5. *Severance of Trial Against Defendants*

O&I contends that the district court erred in denying its motion for severance from the trial against Manville. This determination is also reviewed under an abuse of discretion standard. *United States v. Arthur*, 949 F.2d 211, 217 (6th Cir. 1991). O&I essentially avers that there was substantial evidence introduced regarding Manville which was unrelated to O&I. According to O&I, Manville was not motivated to fully litigate its substantive claims because The Manville Fund was merely established to compensate individuals who suffered injury from exposure to asbestos-containing products manufactured by Johns-Manville Corp. O&I contends that a joint trial under these circumstances increased its likelihood of being assessed punitive damages.

We note first that O&I was not assessed punitive damages and thus its argument that this was a likely result

of the joint trial is untenable. Moreover, the issues related to Manville were broad and not likely to be confused with those related to O&I. Manville failed to contest its awareness of the health hazards of asbestos products, but this argument was clearly distinct from O&I's argument that it was unaware of the potential danger of its product. Therefore, although there were some inconsistencies in the trial strategies of Manville and O&I, the district court did not abuse its discretion in denying the motion to sever these trials.

6. *Extrajudicial Publicity*

O&I contends next that two days prior to the jury verdict on August 1, 1990, a highly inflammatory newspaper article was published in *The Cleveland Plain Dealer* regarding this case. O&I did not learn of the article until September 25, 1990. It moved for voir dire upon learning of the article to ascertain whether any of the jurors had read or were prejudiced by the article. The district court never ruled on this motion. O&I contends that it must be presumed that the article was read by one or more of the jurors, and, accordingly, the jury verdict must be reversed or a new trial granted.

A district court has broad discretion regarding issues on voir dire. *James v. Continental Insurance Co.*, 424 F.2d 1064 (3d Cir. 1970). Fed. R. Civ. P. 47(a) provides that "the court shall permit the parties or their attorneys to supplement the [voir dire] examination by such further inquiry *as it deems proper*. . . ." (emphasis added). While the district court in this case did not question the jurors regarding the article at issue, the court gave the customary admonition to the jurors not to speak among themselves prior to deliberations and to base their decision on evidence admitted into trial. In addition, the two-month trial was substantially completed when the article was published. Under these circumstances, we conclude that the district court did not abuse its discretion by refusing to conduct voir dire.

B. *THE ROBY TRIAL*

We next review the alleged errors in the trial brought by the Roby plaintiffs. The appeal against plaintiff Roby was brought solely by defendant O&I ("defendant"). We address defendant's contentions in seriatim below.

1. *Sufficiency of the Evidence*

Defendant contends that the district court erred in denying its motion for judgment notwithstanding the verdict. According to defendant, there was insufficient evidence that Roby's alleged exposure to defendant's product caused his injuries.

Roby testified at trial that he was exposed to defendant's asbestos-containing product, Kaylo, over a period of approximately six years. He had a total work history, however, of 34 years during which he was regularly exposed to asbestos. Roby's medical expert testified that all of Roby's exposures to asbestos over time must be considered causative of his condition. The expert did not specify that exposure to Kaylo was a substantial contributing cause of Roby's injuries. Defendant contends that generalized proof will not suffice to prove individual damages. *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988). Moreover, when exposed to many products, a plaintiff must show that exposure to defendant's product was a substantial factor. *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (Ohio St. 1990).

There was more than "generalized proof" presented in this case. There was direct evidence that Roby was exposed to defendant's product and that any such exposure contributed to his condition. In addition, the "substantial factor" test in *Pang* is inapplicable to this case. In *Pang*, the court considered the liability of several alleged tort-feasors where there were "independent concurring acts [which] caused distinct and separate injuries to the plaintiff or where some reasonable means of apportioning

the damages [was] evident." *Id.* at 197-98. Injuries such as Roby's which arise from prolonged exposure to a substance are not "distinct and separate." Nor is its cause capable of being apportioned among the alleged tort-feasors. In light of the evidence in this case, we conclude that the jury verdict was sufficiently supported.

2. *Punitive Damages*

Defendant contends that the district court erred in permitting the jury to consider an award of punitive damages. The Ohio standard for punitive damages, as set forth in *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), is that there must exist either: (1) a state of mind under which a person's conduct is characterized by hate, ill will or a spirit of revenge; or (2) a conscious disregard for the injured party's rights and safety such that the tort-feasor knew its actions had a great probability of causing substantial harm.

Roby asserts that there was substantial testimony that defendant knew about the probable hazards of exposure to asbestos. For example, in a letter dated March 12, 1943, to defendant's director of research, it was stated that Kaylo had the makings of "a first class hazard." There was another letter in November 1944 in which the director of one of defendant's laboratories was told that Kaylo constituted a hazard "either to employees engaged in the manufacture of it or to others in the use of installation of it." There were also tests which found "unmistakable evidence of asbestosis" in laboratory animals. There was additional evidence which, in total, suggested that defendant had knowledge of the hazards of asbestos exposure, yet permitted its continued use without warning to those exposed to the product. This evidence substantially supported a conclusion that defendant acted in conscious disregard of the injured parties' safety.

Nevertheless, defendant argues that due process prohibits the award of punitive damages in this case due to

defendants' assessed and potential liability to hundreds of other parties against it. Essentially, defendant argues that the award of punitive damages in numerous cases arising from the same conduct results in overkill. Defendant states in its brief that "[a]t some point courts should cease punishing a defendant for the same mistake." In support of this proposition, defendant cites *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982), which stated that "unlimited multiple punishment for the same act . . . would violate the sense of 'fundamental fairness' that is essential to constitutional due process." *Id.* at 1188 (dissenting opinion).

As a threshold matter, defendant advanced the above argument from *Federal Skywalk* without disclosing that its position was taken from the dissenting opinion. Moreover, *Federal Skywalk* is inapplicable to this case. The issue of punitive damages in that case arose in the contevt of a challenge to certification of a class which sought punitive damages. The majority did not even consider the punitive damages issues in its ruling. To the extent that the issue of multiple punitive damages was even raised, the claim was based on Missouri law. Accordingly, there is no support for defendant's claim that the award of multiple punitive damages is fundamentally unfair and we reject this contention.

3. *Consolidation of Cases, Substitution of Judges and Foreclosure of Discovery*

Defendant argues that the district court abused its discretion by foreclosing discovery in this case. Defendant contends that the district court stayed all discovery "in terms of preparation for trial" for a period of time. Defendant admits that the court allowed discovery by interrogatories, the SPRINT interviews and the collection of medical records. Defendant suggests, however, that this was for the limited purpose of settlement dis-

cussions. Defendant also implies that since the district court did not announce that it would begin trial on June 5, 1990, until April 24, 1990, defendant had inadequate time to prepare for trial.

The district court's decision to initially limit discovery was not an abuse of discretion. Defendant's attempt to distinguish preparation for trial and preparation for settlement discussions is wholly without merit. The limited, although substantial, initial discovery was relevant for either proceeding. Moreover, the district court did eventually permit full discovery in this case for all parties. Therefore, there was no abuse of discretion by the "foreclosure" of discovery. We also reject defendant's contention that it was given inadequate notice of trial.

Defendant contends next that the district court abused its discretion in consolidating this case with the case against Solly during the first two weeks of trial. This claim is also meritless. As discussed above, this decision was within the discretion of the district court, and there appears to have been no abuse whatsoever in consolidating the Solly and Roby cases on the general issues addressed during the first two weeks of trial.

Defendant also argues that the district court abused its discretion by permitting Judge Dowd to sit in place of Judge Lambros for two days. As stated above, however, defendant failed to raise this issue at trial and may not do so on appeal.

4. *"Denial" of Live Testimony by defendant's expert witness*

One of defendant's witnesses, Dr. Stephen Ayers, was allegedly scheduled to testify on July 13, 1990, on the same day that plaintiff's expert testified. Dr. Ayer's [sic] was unable to testify on that date, however, because the district court held up his testimony until plaintiff's witness was done testifying. Defendant contends that the district court held up defendant's expert testimony in order to

"punish" defendant for alleged improper and "hard ball" tactics by defendant. Defendant alleges that the district court so ruled with knowledge that Dr. Ayers was leaving the country the following week and was thereafter unavailable to testify. We do not believe, however, that the district court's decision to postpone the testimony of Dr. Ayers beyond July 13, 1990, was an abuse of discretion. The district court was under no obligation to postpone the testimony of plaintiff's witness in order to accommodate defendants. Moreover, the district court did admit the videotaped testimony of Dr. Ayers.

5. *Exclusion of Superseding Causation Evidence*

Defendant contends that the district court abused its discretion by excluding evidence that Roby's employer, B&O Railroad, was the superseding cause of Roby's injuries. Defendant desired to introduce evidence that B&O was a sophisticated user of asbestos-containing products and that B&O failed to take the proper precautions to prevent asbestos-related injuries. The district court denied the admission of any such evidence.

The factors generally used to evaluate the reasonableness of a supplier's reliance on a learned intermediary are as follows:

(1) the dangerous conditions of the product;

(2) the purpose for which the product is used;

(3) the form of any warnings given;

(4) the reliability of the third party as a conduit of necessary information about the product;

(5) the magnitude of the risk involved; and

(6) the burdens imposed on the supplier by requiring that he directly warn all users.

Adams v. Union Carbide, 737 F.2d 1453 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984).

In *Adams*, defendant Union Carbide supplied a toxic chemical to General Motors Corp., whose employees were exposed to the chemical's toxic vapors during their work at GM. The Court concluded that Union Carbide had fulfilled its duty to warn by supplying GM with detailed information about the chemical's hazards, providing information to be disseminated to GM's employees, and providing instructions to GM to limit exposure to the chemicals.

In this case, no warnings were given to B&O or provided for its employees by defendant. Therefore, it is irrelevant that defendant learned in hindsight that B&O may have been aware of a potential danger in exposure to defendant's product. Such alleged knowledge by B&O did not exonerate defendant of its duty to warn B&O and those employees exposed to Kaylo. The district court's conclusion to exclude this evidence was not an abuse of discretion.

5. *Admission of Hearsay Evidence*

Defendant avers that the district court committed clear error in admitting evidence of summary depositions in lieu of live testimony of certain corporate officials during the "common issues" portion of the trial. Both parties were permitted to summarize those depositions which they wished to present, however, and the testimony was merely narrative. Therefore, the ruling to admit the summary depositions was not clear error.

6. *Jury Instructions*

Defendant contends that the district court gave erroneous or insufficient jury instructions as follows: (1) the court gave an insufficient explanation of causation; (2) the court applied the incorrect test regarding the award of punitive damages; (3) the court failed to explain that compliance with governmental standards is strong evidence that a product is not defective; and (4)

the court gave insufficient instructions regarding the adequacy of warnings.

First, defendant alleges that the district court erroneously characterized the elements that Roby was required to establish regarding proximate cause in its charge to the jury. Defendant acknowledges, however, that the court later gave a corrected charge. Moreover, the verdict forms contained the correct charge. Therefore, there was no error in the jury charge on proximate cause.

Defendant also challenges the jury charge regarding punitive damages. The district court instructed that:

> Punitive damages may be awarded where a manufacturer's testing, examination and procedure for a product are so inadequate as to manifest a flagrant indifference as to the probability that the product might expose consumers to unreasonable risks of harm.

Defendant contends that the court should have instructed the jury pursuant to *Preston*, which mandates a showing of a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston*, 32 Ohio St.3d at 336.

We do not believe that the standard recited by the district court was substantially different from the *Preston* standard. Therefore, we conclude that any error in the charge was harmless.

Defendant contends that the district court gave an erroneous instruction on the duty to warn. According to defendant, the district court set forth the elements for the duty to warn under the strict liability standard provided in Section 402A of the Restatement of Torts 2d. The district court directed that:

> [I]t is the law that one who sells any product in a defective condition, unreasonably dangerous to the user or the consumer, is subject to liability for physi-

> cal harm thereby caused to the ultimate user or consumer if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Defendant contends that this was an improper instruction under Ohio law, which applies a negligence standard to the duty to warn.

Defendant avers that *Crislip v. TCH Liquidating Co.*, 52 Ohio St.3d 251, 556 N.E.2d 1177 (1990), provided that the same standard for the duty to warn is applied in negligence and strict liability cases. The court stated that:

> Under either a negligence or strict liability theory, the important factors for the jury to consider were whether the defendant knew or should have known of the danger and whether the warning allowed the consumer to use the product safely. In a products liability case where a claimant seeks recovery for failure to warn or warn adequately, it must be proven that the manufacturer knew, or should have known, in the exercise of ordinary care, of the risk or hazard about which it failed to warn. Further, there will be no liability unless it be shown that the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. Thus, the standard imposed upon the defendant in a strict liability claim grounded upon an inadequate warning is the same as that imposed in a negligence claim based upon inadequate warning.

Id. at 257. According to defendant, the district court's failure to give an instruction consistent with *Crislip* was error.

The distinction urged by defendant is indeed an important one. Based on the district court's instruction,

the jury need only have determined that defendant's product was defective and defendant failed to warn. Under the standard enunciated in *Crislip*, there must be proof that the defendant knew or should have known of the alleged danger of its product and yet failed to warn its users.

In the context of this entire case, however, we do not believe that the proper instruction would have altered the jury's verdict. As noted above, in order to grant punitive damages, the jury found that defendant acted with "flagrant indifference as to the probability that its product might expose [Roby] to unreasonable risk of harm." We believe that this finding supports an inference that the jury would have found that defendant knew of or should have known the risk or hazard of exposing workers to asbestos. Therefore, we hold that the improper instruction was harmless error.

Defendant also contends that the district court erroneously instructed the jury on the issue of medical causation; i.e., whether asbestos dust from defendant's product caused his cancer. The district court declined to instruct, as requested by defendant, that "if the injuries complained of might well have resulted from any one or several causes, plaintiffs must prove evidence which will exclude the effectiveness of those causes for which a defendant is not legally responsible." Defendant concludes that the omission of this explanation "left the jury with the perception that the evidence of exposure of other asbestos-containing products was not relevant to plaintiff's case." We find no merit in this argument.

The district court in this case did instruct the jury on causation. In assessing causation, the jury necessarily considered whether there were products other than defendant's product which caused Roby's injuries. This determination was implicit, and the district court's refusal to specify the relevance of other causes in assessing

whether defendant's product caused Roby's injury was not erroneous.

Finally, defendant contends that the district court erred by not instructing the jury that if defendant complied with government safety standards, then that was "strong and substantial evidence" that its product was not defective. Defendant presented evidence that during the relevant time period medical science believed that there was a safe level of exposure to asbestos. Testimony established that Ohio had implemented threshold limit values for asbestos and the American Conference of Governmental Industrial Hygienists had promulgated a safe exposure standard for asbestos, with which defendant complied.

In a products liability case involving the applicability of the Occupational Safety and Health Act ("OSHA"), this Court held that the trial court's refusal to admit OSHA standards was appropriate. *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601 (6th Cir. 1985). *Bailey* suggests that it is not always necessary to consider compliance with government standards in determining liability for a defendant's product. Moreover, in this case, there was a dispute as to whether defendant even complied with the applicable government standards by measuring the levels for asbestos at its commercial sites or specifically at Roby's place of employment. Therefore, the district court's failure to give the requested instruction was, at most, harmless error.

III.

For the above stated reasons, we AFFIRM the jury verdicts and the judgments by the Honorable Thomas D. Lambros and the Honorable David D. Dowd, Jr., United States District Judges for the Northern District of Ohio.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C88-0293

FREDERIC E. ROBY,
Plaintiff,

vs.

OWENS-ILLINOIS, INC.,
Defendant.

JUDGMENT ON JURY VERDICT

THOMAS D. LAMBROS, CHIEF JUDGE

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

that the Plaintiff, Frederic E. Roby, recover of the Defendant, Owens-Illinois, Inc. the sum of $250,000.00 compensatory damages and $250,000.00 punitive damages.

Dated at Cleveland, Ohio, this 20 day of August, 1990.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C87-1784

FRANCES A. SOLLY,
Executrix of the estate of Donald J. Solly,
Plaintiff,

vs.

OWENS-ILLINOIS, INC.,
Defendant.

JUDGMENT ON JURY VERDICT
[Filed Aug. 20, 1990]

THOMAS D. LAMBROS, CHIEF JUDGE

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

that the plaintiff recover of the defendant, Owens-Illinois, Inc., the sum of $200,000.00 for Donald J. Solly's medical expenses and pain and suffering;

that the plaintiff recover of the defendant, Owens-Illinois, Inc., the sum of $200,000.00 for the wrongful death of Donald J. Solly; and

Dated at Cleveland, Ohio, this 20 day of August, 1990.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C87-1784

FRANCES A. SOLLY,
Plaintiff,

vs.

OWENS-ILLINOIS, INC.,
Defendant.

JUDGMENT ON JURY VERDICT

THOMAS D. LAMBROS, CHIEF JUDGE

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

that the plaintiff recover of the defendant, Owens-Illinois, Inc., the sum of $350,000.00 for the loss of consortium of Frances A. Solly.

Dated at Cleveland, Ohio, this 20 day of August, 1990.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C88-0293

FREDERIC E. ROBY,

Plaintiff,

vs.

OWENS-ILLINOIS, INC.,

Defendant.

ORDER

[Filed Dec. 3, 1990]

THOMAS D. LAMBROS, CHIEF JUDGE

This asbestos-related personal injury action came on for trial on July 9, 1990. The trial lasted 12 days. Upon hearing the evidence on the issues of state of the art, product identification, product exposure, medical causation and compensatory and punitive damages, eight jurors rendered a unanimous verdict awarding the Plaintiff, Frederic E. Roby, $250,000.00 compensatory damages and $250,000.00 punitive damages. Defendant Owens-Illinois, Inc. moves that it be granted a set-off against the amount of damages, both compensatory and punitive, for all amounts recevied by Plaintiff from prior settlements with other defendants. Defendant also moves for a judgment notwithstanding the verdict, or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 50(b), 59(a) and 59(e); if such motion is denied, Defendant moves that the damage verdict be set aside or remitted.

Motion for Set-Off

In support of its motion for a set-off, Defendant relies on the common law of the State of Ohio and upon Ohio Statutory provisions pertaining to contribution among joint tort feasors.

Plaintiff does not dispute that Defendant is entitled to set-off the amount received by Plaintiff from prior settlements with other defendants against the amount of compensatory damages awarded by the jury. Plaintiff contends that under Ohio common law set-off is unavailable to an award of punitive damages.

The common law rule in Ohio completely denied the right of contribution among joint tort-feasors. *Royal Indemnity Co. v. Becker* (1930), 122 Ohio St. 582; *State Farm Mut. Auto. Ins. Co. v. Charlton* (1974), 41 Ohio App. 2d 107; *Cochran v. B. & O. R.R. Co.* (1974) 41 Ohio App. 2d 186; also see 6th Circuit Court of Appeals ruling in *Fidelity & Casualty Co. of New York v. Federal Express*, 136 F.2d 35 at 41, holding that "in Ohio, there is no right of contribution between persons whose concurrent negligence has made them liable in damages." While the common law rule was partially abolished in 1976 when the Ohio General Assembly enacted Ohio Revised Code § 2307.31 and § 2307.32 which provided for contribution among two or more persons jointly or severally liable in tort, those provisions did not alter the common law rule that set-off is unavailable as to punitive damages. Ohio Revised Code § 2307.31(A) reinforces the common law practice that liability for intentional tortious behavior receives no set-off by including the provision that:

> There is no right of contribution in favor of any tort-feasor who intentionally has caused or intentionally has contributed to the injury or loss to person or property or the wrongful death.

There are social policy reasons for not permitting the set-off of punitive damages. Punitive damages are meant

to punish and deter certain types of intentionally tortious conduct. To achieve the social policy goals for which punitive damages were conceived, the tortfeasor must be made to pay for its misdeeds from its own pocket.

Counsel for Plaintiff has reported that an amount in excess of the $250,000.00 compensatory damages award was received from prior settlements with other defendants. Accordingly, the motion of Defendant Owens-Illinois, Inc. for a set-off as to the full amount of the compensatory damages is granted but denied as to the award for punitive damages for the reasons set forth above.

Motion for Judgment Notwithstanding the Verdict

As grounds for its motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, Defendant contends that: 1) Plaintiff failed to present legally sufficient evidence from which a jury could reasonably conclude that exposure to asbestos-containing products manufactured by the Defendant was a substantial cause of any injury to Plaintiff; 2) the Court erred in submitting the issue of punitive damages to the jury because the evidence presented by Plaintiff was insufficient to support a jury verdict for punitive damages against Defendant; and 3) the Court erred in submitting the charge regarding the law of strict liability because Defendant believes the Court improperly emphasized that element of law above all other elements, resulting in such bias and prejudice to Defendant that a fair and impartial verdict was precluded.

For the reasons set forth below, Defendant's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, is denied. Defendant's request that the damage verdict be set aside or remitted is also denied.

Sufficiency of Evidence

Plaintiff presented sufficient evidence from which a jury could reasonably conclude that exposure to the

asbestos-containing product manufactured by Defendant, known as "Kaylo," was a substantial cause of the lung disease of "mesothelioma" contracted by Plaintiff. In deposition testimony taken of Plaintiff and presented at the trial, Mr. Roby testified that in his employment as a boilermaker and a pipefitter for the B & O Railroad at Cumberland, Maryland from 1948-1954 and at Willard, Ohio from 1954-1958, he was exposed to Defendant's product Kaylo. In addition to this product identification and exposure testimony, Plaintiff introduced sales invoices as documentary evidence showing Kaylo shipments to those jobsites. Competent medical testimony established that each of Plaintiff's exposures to asbestos fibers contributed to the overall dosage which caused Plaintiff to contract the lung disease mesothelioma. The competent medical testimony was bolstered by competent epidemiological testimony establishing asbestos as a producing cause of the lung disease mesothelioma. The exposure and medical causation evidence was of sufficient weight, value and reliability to sustain the verdict. The medical testimony relating to the disease of mesothelioma was not challenged or refuted by any defense testimony. The dispute involved product identification, product exposure and the relationship between exposure and the disease mesothelioma. The trial evidence supports the submission of these issues to the jury, the inferences drawn by the jury, and the verdict.

Punitive Damages

The Court did not err in submitting the issue of punitive damages to the jury. Defendant contends that the Court's charge, taken from *Leichtamer v. American Motors Corp.*, (1981), 67 Ohio St. 2d 456, 424 N.E. 2d 568, constitutes reversible error. The charge was:

> Punitive damages may be awarded where a manufacturer's testing and examination procedure for a product are so inadequate as to manifest a flagrant

> indifference to the probability that the product might expose consumers to unreasonable risks of harm.

Defendant states that in Ohio, the award of punitive damages hinges upon a finding of actual malice. *Detling v. Chockley*, 70 Ohio St. 2d 134 at 136, 436 N.E. 2d 208. *Preston v. Murty*, 32 Ohio St. 3d 334 (1987), 512 N.E. 2d 1174. While *Preston* defined "actual malice" as

> 1) A state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or
>
> 2) conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

it did not overrule the Ohio Supreme Court's language in *Leichtamer*. Moreover, Plaintiff introduced an abundance of evidence, including exchanges of letters and reports between independent researchers at the Saranac Lake Laboratory and researchers and officials of Defendant, from which the jury could reasonably conclude that Defendant's actions demonstrated a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." This state of the art evidence provided a substantial basis for the jury to conclude that despite knowledge of the health hazards and dangerousness of asbestos, the Defendant failed to warn the ultimate consumer.

Defendant contends the burden of proof shall be on the Plaintiff to demonstrate by "clear and convincing evidence" that he is entitled to recover punitive damages citing amendments to the Ohio Tort Reform Act, Ohio Revised Code § 2315.21(C)(3). However, the provisions of those amendments

> shall apply only to tort or other civil actions that are commenced on and after the effective date of this act and that are based upon claims for relief that arise

> on or after that date, and only to tortious conduct that occurs on or after that date.

Ohio Revised Code § 2315 Section 3(A). Thus, the statute is inapplicable on its face since the amendments became effective on January 5, 1988 while the tortious conduct of Defendant occurred from 1948-1958.

Plaintiff Frederic E. Roby presented a sufficient evidentiary foundation for submission of the punitive damages issue to the jury.

Strict Liability

The Court did not err in submitting the charge regarding the law of strict liability. Defendant believes the Court improperly emphasized the law of strict liability above all other elements. The charge placed no undue emphasis on this segment of the applicable law. The strict liability concept was the gravamen of the liability basis of this case. The charge stated the law concisely and neutrally. The jury charge on strict liability was expressed as follows:

> Frederic E. Roby claims that he was injured as a result of his exposure to asbestos in the insulation materials manufactured and sold by Defendant Owens-Illinois, Incorporated during his years of employment as a boilermaker and pipefitter. Frederic E. Roby asserts his right to recovery against Owens-Illinois under the principles of law known as strict liability.
>
> My opening words in these instructions was a reading in pertinent part of the principle of law which the claims of Mr. Roby are asserted. Owens-Illinois denies that Frederic E. Roby has been injured by his exposure to asbestos in the insulation materials manufactured and sold by Owens-Illinois.
>
> Frederic E. Roby in this case claims damages for personal injuries alleged to have been caused by a

defective condition in the asbestos materials produced by Owens-Illinois.

Frederic E. Roby must establish by the preponderance of the evidence four elements in order to recover on this claim as to these claims against Owens-Illinois. Those elements are as follows:

(1) That Owens-Illinois manufactured or sold asbestos-containing product used by Frederic E. Roby; and

(2) That Owens-Illinois was normally engaged in the business of selling such products; and

(3) That the asbestos-containing products were expected to and did reach plaintiff without substantial change in the condition in which they were in when sold; and

(4) That at the time of such manufacture or sale, the asbestos-containing products were in a defective condition and unreasonably dangerous.

If you do not find that Owens-Illinois manufactured or sold the product to which Mr. Roby was exposed, then you shall return a verdict for Owens-Illinois on the plaintiff's strict liability claim. If you find, on the other hand, by a preponderance of the evidence that Owens-Illinois manufactured and/or sold the product to which Mr. Roby was exposed, then you shall go on to the second element of the plaintiff's strict liability claim.

As to the second element, if you do not find by a preponderance of the evidence that Owens-Illinois was normally engaged in the business of manufacturing and selling the products to which Mr. Roby was exposed, then you shall return a verdict for the defendant on the plaintiff's strict liability claim. If, on the other hand, you find by a preponderance of the evidence that Owens-Illinois was normally engaged in

the business of manufacturing and selling the products to which Mr. Roby was exposed, then you shall go on to the third element.

Regarding the third element, Frederic E. Roby must prove by a preponderance of the evidence that the asbestos containing products were expected to and did reach Mr. Roby without substantial change in the condition in which they were manufactured and sold. You are instructed that the defendant is only liable for a defective condition which was present at the time the defendant, Owens-Illinois, manufactured and/or sold the product and parted possession with it. Unless you find that the defective condition complained of was in existence at that time, the plaintiff is not entitled to recover from the defendant.

Regarding the fourth element of the plaintiff's strict liability claim, you are instructed that a defective condition unreasonably dangerous to the consumer exists if the product is, at the time it leaves the seller's hands, more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is used. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the plaintiff. A product is not defective merely because it is possible to be injured as a result of using it.

A manufacturer cannot be held liable under strict liability solely upon failure to give an adequate warning. The plaintiff may not attempt to prove that the product was defective by arguing that the product lacked the proper warnings. The plaintiff must prove by a preponderance of the evidence that there was, in

fact, a defect in the product manufactured by Owens-Illinois. If you find that with the proper precautions the asbestos product was capable of being used safely, plaintiff cannot recover on this strict liability claim and you must return a verdict in favor of the defendant.

The special verdict presented to the jury appropriately imposed upon the jury the responsibility of applying the above-stated legal principles of strict liability to the evidence and required the jury to answer special interrogatories to which the jury unanimously responded affirmatively. The special interrogatories and their unanimous response thereto were as follows:

1. Do you find from a preponderance of the evidence that Frederic E. Roby contracted mesothelioma as a result of exposure to asbestos products? *Answer*: Yes.

2. Do you find from a preponderance of the evidence that Frederic E. Roby was proximately exposed to and that he did inhale asbestos fibers emitted from Owens-Illinois' product Kaylo? *Answer*: Yes.

3. Do you find from a preponderance of the evidence that asbestos fibers emitted from Owens-Illinois Inc's product was a proximate cause of Frederic E. Roby's mesothelioma? *Answer*: Yes.

4. Do you find from a preponderance of the evidence that Owens-Illinois Inc. knew or in the exercise of reasonable care should have known in light of the state of the art of scientific knowledge which existed at the time of manufacture of its asbestos containing asbestos product Kaylo that there was a hazard to users such as Mr. Roby of contracting lung disease from using the product? *Answer*: Yes.

5. Do you find from a preponderance of the evidence that Owens-Illinois Inc. failed to give adequate

warning to users that there was a hazard of contracting lung disease from use of Kaylo? *Answer*: Yes.

6. If you answer Question 5 "Yes," do you find from a preponderance of the evidence that the failure to give adequate warning was a proximate cause of Mr. Roby's mesothelioma? *Answer*: Yes.

7. What do you find from a preponderance of the evidence are Frederic E. Roby's compensatory damages, if any? *Answer*: $250,000.00

8. Do you find from a preponderance of the evidence Frederic E. Roby to be entitled to an award of punitive damages against Owens-Illinois? *Answer*: Yes.

a. If you answer yes, what amount of punitive damages, if any, do you find? *Answer*: $250,000.00

Remitter

Not only is the record void of an atmosphere of passion and prejudice, the finding of this trial judge is that this case, which involved the most serious of asbestos-related diseases, was tried in a bland and conservative atmosphere and in a very "matter of fact" mood, totally absent of any appeal to the passion and prejudice of the jury.

Having found no indication of passion, prejudice or prejudicial error affecting the jury's verdict, and viewing the award of compensatory and punitive damages as not unreasonable in light of the verdicts rendered in similar cases around the country, there are no grounds for the damage verdict in this case to be set aside or remitted.

Conclusion

Defendant Owens-Illinois, Inc's post-judgment motion for set-off is granted as to compensatory damages but denied as to punitive damages.

Defendant's motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial is denied, as is Defendant's motion that the damage verdict be set aside or remitted.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

At Cleveland, Ohio
Dated: December 3, 1990

APPENDIX E

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C87-1784

FRANCES A. SOLLY, ETC.,
Plaintiff,

VS.

ACANDS, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Dec. 28, 1990]

I. *INTRODUCTION.*

This wrongful death action based on the claim that the decedent died as a result of an exposure to asbestos products was initially the subject of settlement efforts by the Honorable Chief Judge Thomas Lambros of this Court. The plaintiff and four defendants, Owens Illinois Corp., Manville Fund, Pittsburgh Corning and Celeotex, were unable to agree on settlement. Prior to trial, the plaintiff settled with other defendants and received the sum of $119,000. Following a lengthy jury trial presided over initially by Judge Lambros and to a conclusion by this Court, the jury was presented with a series of thirty-six interrogatories. As a result of the answers to the in-

terrogatories, the jury awarded a verdict against the defendants Owens Illinois Corp. and the Manville Fund for compensatory damages the sum of $750,000 [1] and denied punitive damages.

The jury found for the remaining defendants Pittsburgh Corning and Celotex.

The defendants Owens Illinois and the Manville Fund have filed motions for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial, and a remittitur. Additionally, the defendants seek a set off of $119,000 based upon the settlement reached by the plaintiff with the other defendants. *See* Plaintiff's Response to Motion for Set Off, at 1-2.

II. *DISCUSSION.*

A. *Motion of Owens Illinois for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial.*

Owens Illinois asserts the following bases for the relief requested.

1. Plaintiff failed to present legally sufficient evidence from which a jury could reasonably conclude that exposure to asbestos-containing products manufactured by O-I was a substantial cause of any injury to the plaintiff.

2. Plaintiff failed to produce legally sufficient evidence at trial to generate a jury question or support a jury verdict that O-I's alleged failure to warn of the alleged dangers of asbestos was the proximate cause of Mr. Solly's alleged injuries.

---

[1] The jury granted compensatory damages as follows:

1. Decedent's medical expenses and pain and suffering in the sum of $200,000;

2. For the wrongful death of the decedent the sum of $200,000; and

3. For the loss of consortium of the plaintiff widow $350,000.

3. Plaintiff failed to produce legally sufficient evidence at trial to support a jury verdict that the product Kaylo manufactured by O-I was defective or unreasonably dangerous at the time of its manufacture under the then existing state of medical and scientific knowledge concerning potential health hazards of asbestos.

4. The compensatory damage awards in this case are so grossly disproportionate to any proof of damages and are so excessive that they indicate bias, passion, or prejudice on behalf of the jury against defendants. Plaintiffs failed to offer any evidence as to the appointment of Mrs. Solly as Executrix, and her standing to sue on behalf of the decedent's estate, and therefore the claim for wrongful death must fail and the verdict be remitted. This Court should set aside the damage verdict and order remittitur because of the extreme disproportion between the awards and the evidence of damages "shocks one's conscience" thereby requiring a new trial.

5. The Court erred in submitting to the jury the issue of punitive damages against O-I in that the evidence presented by plaintiff was insufficient to support a jury verdict for punitive damages against O-I. Although the verdict returned by the jury did not specify an amount for punitive damages, the submission of the issue of punitive damages was so prejudicial as to taint the verdict. This defendant has filed a separate memorandum in support of this motion for judgment notwithstanding the verdict on the issue of punitive damages and incorporates the grounds and arguments set forth in such separate memorandum herein.

6. This defendant adopts, as if incorporated herein, all other grounds raised by other defendants in their

respective motions for judgment notwithstanding the verdict or a new trial.

B. *Motion of the Manville Fund for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial.*

The Manville Fund asserts the following bases for the relief requested:

1. Contrary to the express provisions of Ohio Asbestos Litigation Order No. 32, custom within the United States District Court for the Northern District of Ohio, and the policy established by Chief Judge Thomas D. Lambros in relation to the use of SPRINT interviews, the SPRINT interview of Plaintiff's decedent was admitted into evidence at the trial of this action; and
2. The trial court failed to apply the correct substantive law, the law of the State of New York, to Plaintiff's claims.

C. *Ruling on the Motion of Owens Illinois.*

The Court will rule and decide *in seriatim* the claims raised by Owens Illinois.

Branch 1 and Branch 2.

The plaintiff presented ample testimony by way of the decedent's work history and the testimony of a co-worker to support the jury's finding tat [sic] the decedent was exposed to the defendant Owens Illinois' asbestos bearing product. The testimony of Dr. Ralph Huller and Dr. Kleinerman supported the proximate cause findings.

Branches 1 and 2 are overruled.

Branch 3.

The third branch of the defendant's motion is without merit and is overruled.

Branch 4.

The jury's award of $350,000 for loss of consortium damages nearly equals the damages allowed for pain and suffering of the victim-decedent and for the wrongful death of the decedent. The victim was obviously not in Court, but the widow-plaintiff was present and offered moving testimony with respect to the decedent's suffering and difficult death as well as moving testimony as to her damages arising from the loss of consortium. The issue that arises is whether a new trial or remittitur should be granted as to the loss of consortium damages where they appear disproportionate to the other damages awarded. Neither party has seen fit to brief this issue. The total award does not, as claimed by the defendant, shock the conscience so as to award a new trial or a remittitur. Absent any briefing by the parties on the issue of a disproportionate award of loss of consortium damages, the Court declines to grant a remittitur.

Branch Five.

The defendant objects to the Court having instructed the jury on the issue of punitive damages. However, the jury did not award punitive damages. Any error, if error was committed in submitting punitive damages is not prejudicial in the absence of an award for punitive damages.

Branch five is denied.

Branch Six.

The claims raised by the Manville Fund are separate, but as the Court has denied the claims (*infra*), the sixth branch of the motion is without merit and is overruled.

D. *Ruling on the Motion of the Manville Fund.*

Branch One.

The objection to the use of the SPRINT interview of the decedent which became a deposition is without merit.

The Court set forth its reasons during the trial for admitting the deposition of the decedent and remains of the view that it did not err in admitting the deposition which in turn contained the work history of the decedent.

Branch one is overruled.

Branch Two.

The Court has previously addressed the issue of whether the substantive law of Ohio or New York should apply. The Court adopts the reasoning set forth in that opinion and denies branch two.

E. *Motions of Owens-Illinois (docket #1488) and Manville Fund (docket #1507) for Set Off.*

On December 3, 1990, plaintiff filed a response to defendants' motion for a set off of $119,000, the amount plaintiff received from settlements with other defendants. Plaintiff does not challenge the right of defendants to set off the amount of $119,000 against the jury verdict and the defendants' motion for set off is granted.

III. *CONCLUSION.*

The motions of the defendants Owens Illinois and the Manville Fund for judgment notwithstanding the verdict or, in the alternative, for a new trial are denied. The defendants' motions for set off are granted. A judgment entry will be filed granting the plaintiffs judgment against the defendants Owens Illinois and the Manville Fund, jointly and severally, in the sum of $631,000 apportioned as follows:

To the plaintiff Frances A. Solly in her capacity as executrix for the estate of Donald J. Solly, the sum of $168,266.67 for the medical expenses and pain and suffering of the decedent Donald J. Solly; to the plaintiff Frances A. Solly in her capacity as executrix for the estate of Donald J. Solly, the sum of $168,266.67 for

the wrongful death of Donald J. Solly; and to the plaintiff Frances A. Solly the sum of $294,466.66 for her loss of consortium.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OAL Order No. 32

IN RE: OHIO ASBESTOS LITIGATION

SIMPLIFIED PRETRIAL INFORMATIONAL TRANSACTIONS (SPRINT) A CLAIM VERIFICATION PROCEDURE

[Filed Feb. 6, 1985]

THOMAS D. LAMBROS, DISTRICT JUDGE

This order establishes a court-annexed method of claim verification to facilitate settlement of the remaining asbestos cases pending in the Northern District of Ohio. This procedure is designated SPRINT, Simplified Pretrial Informational Transactions. SPRINT is a method of pretrial claim verification by adversarial interviews of witnesses in lieu of depositions. This procedure is being implemented to facilitate the completion of all informational transactions before the March 14th Settlement Conference.

The deposition is one of the most costly aspects of case preparation. Reduction in excessive expenditures of funds for case preparation without a corresponding reduction in the quality of preparation is the purpose of SPRINT.

Counsel have reported that these cases cannot be evaluated for settlement until the depositions of co-workers are

taken. These depositions are essential for product identification, verification of whether or not a particular defendant's product could arguably be considered a factor in causing the plaintiff's injuries. It has been suggested that approximately 600 depositions of co-workers must be taken. Conducting 600 depositions will be costly and time consuming.

A less costly and much faster equivalent of the deposition is required. A predeposition adversarial interview is a quicker alternative means of gathering pretrial information for claims evaluation. It is recognized that counsel have not experienced this type of alternative procedure. The many alternative avenues that are potentially available in lieu of the costly formalistic process of discovery have been considered. It has been determined that SPRINT can work and provide the parties a solution to the dilemma caused by asbestos litigation. SPRINT cuts through the unending jungle of fact gathering and provides a faster, simpler, cheaper, and effective method of obtaining important answers to crucial evaluative questions. SPRINT does not take away the right to conduct the deposition later if it is determined to be necessary.

It is my belief that satisfactory verification will be achieved by this alternative discovery process resulting in the settlement of most, if not all, of the pending cases. If this is achieved the ultimate savings in money and time will be substantial. Let's give it a try. It's worth the effort.

Accordingly, under the authority of Rule 26 of the Federal Rules of Civil Procedure all discovery by deposition in these cases is hereby temporarily suspended. SPRINT, the procedure explained below, shall be employed in place of these depositions.

The Claims Verification Procedure shall be conducted in the following manner:

1. All co-workers and plaintiffs who would otherwise have given testimony by deposition in preparation for

the Settlement Conference shall be interviewed on February 18, 19, 20 and 21.

2. The interviews shall be conducted at the federal courthouses in Cleveland, Akron, Youngstown and Toledo in accordance with a schedule which will accommodate the witnesses and the interviewing teams.

3. The lawyers for the plaintiffs and the defendants shall establish a sufficient number of interviewing teams consisting of at least one plaintiff's lawyer and one defendant's lawyer for each interviewing team.

4. Each interviewing team should complete the interviewing requirements of at least two cases per day.

5. The required number of teams should be established which are necessary to complete the interviews within the time established in this order.

6. A written summarized narrative of each witness interview shall be prepared by each interviewing team. The defense team shall prepare such a narrative and make it available to all defense counsel. The plaintiff team shall prepare such a narrative and make it available to all plaintiffs' counsel.

7. The summarized narratives shall be prepared promptly at the close of the interviewing day and made available for distribution to counsel.

8. All interviews shall be electronically recorded. Each separate plaintiff interview team and each separate defense interview team shall have a tape recorder available at the interview. It is expected that two tape recorders shall be used to record the interviews. Each separate team shall provide the recorder and the cassette.

9. The list of witnesses to be interviewed shall be comprised of those designated on the consolidated

witness list which plaintiffs' counsel are required to prepare in accordance with Ohio Asbestos Litigation Order No. 30.

10. At the February 8th OAL Conference the interviewing teams shall be designated and a schedule shall be prepared establishing team assignments and times and places for the individual witness interviews.

11. Counsel shall coordinate all scheduling requirements with the Ohio Asbestos Litigation Coordinator, Mr. Percy Squire.

12. Counsel for the plaintiffs and counsel for the defendants shall each prepare a separate interviewing format to facilitate expeditious interviewing procedures. The questions should reflect an informational content that is essential for settlement evaluation of these cases. The information required to complete the OAL data collection protocols, which embody the Case Evaluation and Apportionment Process (CEAP) critical case criteria, should serve as a guide for the questioning. The interviews will be adversarial but not obstructive in nature. It is expected that these interviews will provide counsel an informational basis for settlement as well as an opportunity to size-up the overall strength or weakness of the witnesses.

13. During the four day SPRINT procedure lead counsel are expected to coordinate among themselves and with the OAL Coordinator the transmission of all medical and economic loss data necessary for case evaluation.

It is recognized that counsel have not experienced this type of alternative procedure. The various avenues that are potentially available in lieu of costly discovery have been considered. On balance, I have determined that

SPRINT is a feasible means of providing the parties with a solution to the dilemma caused by the magnitude of discovery in asbestos litigation.

The discovery provisions outlined in Rules 26 through 37 of the Federal Rules of Civil Procedure set forth the legally sanctioned methods of gathering information for purposes of trial preparation. In order to expedite the extensive discovery traditionally associated with asbestos litigation, we have attempted to simplify these procedures through the use of consolidated discovery requests. Nonetheless, an excessive amount of time and money is still being expended on discovery in these cases. As a result of our experience, however, we are now better able to determine what information is necessary to place a realistice value on these cases. Accordingly, in order to promote the best interests of justice and the parties, all discovery in these cases pursuant to Rules 27 through 31 is hereby suspended until further order of the Court. As an alternative to these discovery procedures, the parties shall obtain the information necessary to facilitate serious settlement negotiation in accordance with directives of this order.

Each of you know that my work as a trial judge for 25 years combines the usual and customary judicial process of case decisions and resolution with an explorative endeavor constantly in search of better ways to resolve human disputes. All of us have experienced vicariously the thrill of space exploration and medical and scientific advances which have served the physical well being and strength of our nation. That same type of explorative endeavor by lawyers and judges in the universe of law will far exceed the national and potentially world wide benefit of space and medical advances because what we deal with here are matters of human conflicts. Such conflicts are capable of being resolved only through human understanding, which is essential to our existence in a civilized world. Remember when Learned Hand, speaking

at Rockefeller Center before a group of new citizens, defined the spirit of liberty among other things, as, men and women seeking to understand the minds of other men and women.

Here we work in the realm of human controversy seeking new ways to learn and to teach men and women to solve their problems sensibly. We are privileged to have this opportunity as judges and lawyers to apply our energies and our ideas to solving human problems and hopefully bringing about a better human understanding.

I therefore seek your cooperation in the fulfillment of the requirements of this order.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

Dated: February 6, 1985

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: OHIO ASBESTOS LITIGATION

ORDER

[Filed Apr. 6, 1990]

THOMAS D. LAMBROS, CHIEF JUDGE

Defendant Members of the Center for Claims Resolution seek clarification regarding the proper conduct and purpose of SPRINT interviews under OAL Order No. 32. Specifically, these defendants are concerned that the SPRINT process, which is intended to provide the parties an opportunity to question and view the plaintiffs and certain witnesses in preparation for settlement evaluation and preliminary motion practice (SSC I and SSC II), not be converted to one which is targeted towards obtaining information directed primarily at trial preparation.

SPRINTs are informal interviews which can usually be completed in about an hour and which offer a great deal of flexibility (they have, for example, been taken by telephone) while keeping litigation transaction costs to a minimum. Their purpose is not to supplant traditional depositions. Rather, within the OAL case management plan, SPRINTs provide an inexpensive means for the parties to evaluate witnesses for settlement purposes. At a later stage in the OAL process, should full blown depositions be necessary, they may, with leave, be had.

A single counsel on behalf of all defendants should conduct each SPRINT, and no papers, books, or other

documents should be presented to the individual in conjunction with, before or during the SPRINT. To do so would be to misconstrue the very basis for SPRINTs, which is merely to afford the parties an opportunity to question a witness concerning discovery which has been provided by plaintiffs in the very early stages of OAL for settlement and motion practice purposes.

Indeed, Settlement Status Conference I, which is essentially rule day for the first phase of motion practice, contemplates that parties whose motions have been denied based on discovery gathered under the first phase of the OAL plan, may renew their motions after further discovery has been taken in the second or "trial preparation" phase of the plan.

SPRINTs should therefore go forward in accordance with these clarifications.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
Chief Judge
United States District Court

DATED: 4/6/90

Supreme Court, U.S.
FILED
OCT 14 1992
OFFICE OF THE CLERK

No. 92-423

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner

v.

FREDERIC E. ROBY and FRANCES A. SOLLY,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Do repetitive awards of punitive damages for the same course of conduct violate the Due Process Clause under the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991)?

2. Is appellate review of a jury's award of punitive damages adequate under due process where neither the factors identified by the Court in *Haslip*, nor any similar factors, are taken into account?

3. Does Fed. R. Civ. P. 16 permit the admission of prejudicial evidence in direct contravention of a pretrial order?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's petition for certiorari.

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IN THE

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PETITIONER'S REPLY BRIEF

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1. An important conflict among the federal and state courts has developed following this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The Sixth Circuit's decision below is in conflict both with the Third Circuit's recent decision in *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992), and with the Fourth Circuit's *en banc* decision in *Johnson v. Hugo's Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992).[1] Had the Sixth

---

[1] *Hugo's Skateway* was decided the day Petitioner filed its petition for certiorari, while *Dunn* was decided ten days afterwards.

Circuit below applied *Haslip* as have the Third and Fourth Circuits, then the punitive damages award here could not have withstood appellate review.

The award of punitive damages against Owens-Illinois, Inc. ("Owens-Illinois") in this case was not subject to *any* substantive review for excessiveness by the trial or appellate courts. The trial court summarily denied Owens-Illinois' motion for remittitur of the punitive damages award on the grounds that "passion, prejudice or prejudicial error" apparently did not affect the verdict. *See*, Petitioner's Appendix at 33a (hereinafter "Pet. App."). On appeal, the Sixth Circuit did not apply any substantive standards, *see* Pet. App. at 13a-14a, thereby joining the Tenth and Fifth Circuits in failing to apply *Haslip*. *See Mason v. Texaco Inc.*, 948 F.2d 1546, 1560 (10th Cir. 1991) (punitive damages award reviewed only by application of a "shock the conscience" measure for excessiveness), *cert. denied*, 112 S. Ct. 1941 (1992); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991) (approving punitive damages award as "reasonable" without applying *Haslip* substantive standards).

The Third Circuit in *Dunn* performed what it described as an "analogous function" to the review by the Alabama Supreme Court that this Court approved in *Haslip*. *Dunn*, 1992 U.S. App. LEXIS 22749, at *55. This careful review using *Haslip* factors, and in particular the existence of other punitive awards against the appellant, led the Third Circuit to conclude that "the maximum amount of punitive damages that could reasonably have been awarded in this case is $1 million"—one-half the amount permitted by the district court. *Id.* at *76. While the court upheld the district court's review as basically consistent with *Haslip*, it also "recommen[ed] that in the future district courts *explicitly assess* the amount of a punitive damages award in light of the factors set out in comment e of the Restatement." *Id.* at *53 n.22 (citing *Restatement (Second) of Torts* § 908 cmt. e (1977)) (emphasis added). The *Restatement* factors are parallel to

the *Haslip* factors. The Third Circuit's application of the *Haslip* factors is in sharp contrast to the essentially standardless review employed by the Sixth Circuit.

In *Johnson*, the Fourth Circuit *en banc* vacated and remanded an award of punitive damages as inconsistent with the standards announced in *Haslip*. That court observed that substantive review by the state trial and appellate courts was "critical" to this Court's approval of Alabama law in *Haslip*, and determined that while Virginia law might provide sufficiently careful review, the federal court sitting in diversity is prohibited by the Seventh Amendment from applying those standards (which necessarily require taking new evidence) on review of a jury verdict. In the court's view, the "limited scope of review" afforded in federal court pursuant to Fed. R. Civ. P. 59 denied defendant due process. The court concluded that due process requires federal courts in diversity actions to compensate for this limited review by including in instructions to the jury substantive factors like those applied on review of an award of punitive damages awards by Alabama courts and approved in *Haslip*. *Johnson*, 1992 U.S. App. LEXIS 21065 at *9.

This split among the circuits illustrates that litigants are subject to widely different standards on review of awards of punitive damages for excessiveness. Yet respondents argue that this case—which provided no substantive review of an award of punitive damages despite the fact that a second jury heard the same evidence at the same time and did not award punitive damages—is not worthy of this Court's consideration because "no applicable federal appellate decisions conflict on any point raised" by the petition. *See* Brief in Opposition at 11. The inconsistency between the *Solly* and *Roby* punitive damages verdicts surely would have been corrected if subject to the review given punitive damages awards in the Third, Eighth and Eleventh Circuits, or if the juries had

been instructed as carefully as required in federal courts in the Fourth Circuit. The lack of care taken in the "review" of the *Roby* award is demonstrated by the Sixth Circuit's significant mischaracterization of the evidence: in weighing the sufficiency of the evidence in support of the award of punitive damages, the court describes a letter to Owen-Illinois that characterized Kaylo (Owens-Illinois' product) as a hazard to employees engaged in its manufacture and in installation. Pet. App. at 13a. Respondents repeat this misstatement. Brief in Opposition at 4-5. In fact, the letter to which both the Sixth Circuit and respondents refer was a letter *from* Owens-Illinois to a laboratory *asking* whether the product presented a hazard.

This inaccurate portrayal of the evidence is but one example of the haphazard review conducted of the *Roby* award of punitive damages. The lack of substantive review at the trial and appellate levels, together with the disparity in the jury verdicts, make this case an appropriate vehicle for this Court to clarify the principles announced in *Haslip* and remedy the disparate treatment of punitive damages litigants.

2. Respondents argue that any due process limitation on multiple awards of punitive damages for the same course of conduct will undermine a state's interest in punishing and deterring wrongful conduct. Brief in Opposition at 18. Respondents assume that a due process limitation will result in one punitive damages award to the lucky plaintiff who first obtains a verdict. *See id.* at 19 ("If only one punitive damage recovery were allowed, a defendant could calculate the award into the cost of doing business.").

Respondents' argument misconstrues the application of a limitation on repeated awards of punitive damages for a single course of conduct: while one amount might be

assessed as the total sum of punitive damages appropriate, the plaintiffs harmed by the conduct would obtain a share of that sum. The state's interest in safeguarding the rights of its citizens is fully protected by the division of a punitive damages award among all injured parties.

Respondents' position fails to consider this Court's determination in *Haslip* that due process *requires* that punitive damages awards not exceed the amount necessary to serve the societal goals of retribution and deterrence. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044-45 (1991). Without a uniform rule to ensure that a defendant is assessed only the amount of punitive damages necessary to punish and deter a single course of conduct, courts lack the means necessary to weigh other awards with the confidence that awards (and litigants) in other states will be subject to the same process. *See Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (concluding that multiple awards of punitive damages violate due process but allowing award to stand since lack of nation-wide uniformity leaves court "powerless to fashion a remedy which will protect the due process rights of the defendant").

Respondents also argue that the record in this case is insufficient to determine whether previous punitive damages awards paid by Owens-Illinois "reach[] the maximum tolerable under due process." Brief in Opposition at 15. Respondents acknowledge that Owens-Illinois submitted evidence of these awards to the trial and appellate courts below. *See* Brief in Opposition at 5, 15 (affidavits submitted testifying to payment of two awards totalling $1.3 million). The trial court apparently did not consider this evidence at all, and the Sixth Circuit determined that it did not need to do so, since it rejected Owens-Illinois' due process challenge to repeated punishment for the same course of conduct. As evidenced by this failure to consider prior awards, respondents' argument overlooks the fact that there is no mechanism in Ohio law to permit

the court to weigh the payment of other punitive damages awards and determine "the maximum tolerable under due process."

The *Roby* punitive damages award is unconstitutional because Owens-Illinois already has paid punitive damages for the course of conduct alleged in this case. Multiple awards violate the due process principles announced in *Haslip*, and this case presents the appropriate vehicle for this Court to consider the due process concerns implicated by repetitive awards of punitive damages for a single course of conduct.

Respectfully submitted,

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No. 92-423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner

v.

FREDERIC E. ROBY and FRANCES A. SOLLY,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

1. Do repetitive awards of punitive damages for the same course of conduct violate the Due Process Clause under the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991)?

2. Is appellate review of a jury's award of punitive damages adequate under due process where neither the factors identified by the Court in *Haslip*, nor any similar factors, are taken into account?

3. Does Fed. R. Civ. P. 16 permit the admission of prejudicial evidence in direct contravention of a pretrial order?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's petition for certiorari.

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, Owens-Illinois, Inc. ("Owens-Illinois") files this Supplemental Brief to advise the Court of recent developments in the case law cited in support of Owens-Illinois' Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

In its Reply Brief in Support of the Petition for Writ of Certiorari Owens-Illinois discussed a case recently decided by the Third Circuit, *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992). The Third Circuit has vacated the panel's decision in *Dunn*, and granted defendant's Petition for Rehearing and Suggestion for Rehearing *En Banc*. *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 25457 (3d Cir. Oct. 8, 1992).

The Third Circuit's decision to rehear the *Dunn* case *en banc* is evidence of the continued activity and concern

in the lower courts generated by constitutional challenges to claims for punitive damages. The asbestos personal-injury litigation is the cause for much of this activity: indeed, Judge Weis filed a forceful dissenting opinion in *Dunn* based in large part on the number of asbestos personal injury claims and bankruptcy filings by asbestos defendants. Judge Weis advocated striking punitive damages claims from the asbestos personal injury litigation, arguing that "punitive damages should not be recovered because their purposes are not being served and their benefits are outweighed by their cost to society." *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 at *92 (3d Cir. Sept. 18, 1992) (Weis, J., dissenting), *vacated and petition for r'hrg en banc granted*, 1992 U.S. App. LEXIS 25457 (3d Cir. Oct. 8, 1992).

The Third Circuit's decision to re-examine *en banc* the due process concerns implicated by claims for punitive damages emphasizes the importance of this issue and the need for additional guidance from this Court.

Respectfully submitted,

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